Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

CBOCS WEST, INC.,
Petitioner,

v.

HEDRICK G. HUMPHRIES,
Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL W. HAWKINS
MICHAEL J. NEWMAN
Counsel of Record for Petitioner
DINSMORE & SHOHL LLP
Suite 1900
255 East Fifth Street
Cincinnati, OH 45202
(513) 977-8200
(513) 977-8141 fax
michael.hawkins@dinslaw.com
michael.newman@dinslaw.com

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED FOR REVIEW

Is a race retaliation claim cognizable under 42 U.S.C. § 1981?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed on the caption.

Pursuant to Supreme Court Rule 29.6, Petitioner CBOCS West, Inc. makes the following disclosure:

Petitioner is wholly owned by its parent CBRL Group, Inc.

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INTRODUCTORY PRAYER

The Petitioner respectfully requests that a writ of *certiorari* be granted to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 10, 2007.

OPINIONS BELOW

The Opinion of the United States District Court for the Northern District of Illinois, issued on October 6, 2005, is reported as 392 F. Supp.2d 1047 (N.D. Ill. 2006) and has been included in the appendix on pages 47a - 54a. The Opinion of the United States Court of Appeals for the Seventh Circuit, issued on January 10, 2007, is reported as 474 F.3d 387 (7th Cir. 2007) and has been included in the appendix on pages 2a - 46a. The Order of the United States Court of Appeals for the Seventh Circuit denying Petitioner's Request for Rehearing, issued on January 29, 2007, is reported as No. 05-4047, 2007 U.S. App. LEXIS 3124 and has been included in the appendix on page 1a.

JURISDICTION

The Judgment of the Court of Appeals for the Seventh Circuit was entered on January 10, 2007. A timely Request for Rehearing was denied on January 29, 2007. This Petition is timely filed according to Supreme Court Rules 13.1 and 13.3. The Court derives jurisdiction from 28 U.S.C. § 1254(1).

STATUTE INVOLVED

United States Code, *Title 42*:

> *Section 1981(a)* - All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . .
>
> *Section 1981(b)* - For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

STATEMENT OF THE CASE

The sole legal issue presented here - whether race retaliation is cognizable under Section 1981 - is an issue that has suffered from years of jurisprudential vacillation and uncertainty. Appellate and district courts around the country have struggled mightily with the question of whether retaliatory discharge is encompassed within those five seemingly unambiguous words in Section 1981: "to make and enforce contracts." This Court has not squarely addressed this reoccurring question, arguably contributing (albeit inadvertently) to the vacillation and uncertainty with its decisions in *Sullivan v. Little Hunting Park* and *Patterson v. McLean Credit Union*.

A. *Sullivan v. Little Hunting Park* - The Uncertain Beginning Of Retaliation Under Section 1981

The uncertainty surrounding this issue started with *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). In that case, the plaintiff, a white homeowner, sued a non-profit corporation created to operate a community park. *Id.* at 234. The homeowner had a transferable membership interest in the corporation, entitling him to use the park. *Id.* The homeowner sought to transfer his membership interest to a black homeowner, which, pursuant to the corporation's bylaws, required approval from its board of directors. *Id.* at 234-35. The board of directors refused to approve the transfer. *Id.* at 235. When the white homeowner protested, he was expelled from the corporation by the board of directors. *Id.*

The white homeowner then sued under Sections 1981 and 1982 based on his "expulsion for the advocacy" of the black homeowner. *Id.* at 237. This Court held that the white homeowner had standing to bring a Section 1982 action. From the Court's perspective, the white homeowner was "punished for trying to vindicate the rights of minorities protected by s 1982." *Id.* The Court reasoned that "[s]uch a sanction would give impetus to the perpetuation of racial restrictions on property." *Id.* In so holding, the Court did not reference the term "retaliation" or "retaliatory termination," nor analyze the applicability of Section 1981 to the facts. Yet it seemed obvious from the Court's opinion that retaliation claims were cognizable under Section 1982, which, of course, is Section 1981's companion statute. *Humphries*, 474 F.3d at 394 ("it was clear that the white landowner's basis for standing was that he had suffered retaliation for asserting the rights of another"); *General Building Contr. Assoc. v. Pennsylvania*, 458 U.S. 375, 384

(1982) (recognizing that Section 1982 is Section 1981's "companion statute").

In the wake of *Sullivan*, courts divided on the issue. At the district court level, some courts concluded that retaliation was cognizable under Section 1981. *See e.g. Cox v. Consolidated Rail Corp.*, 557 F. Supp. 1261, 1266 (D. D.C. 1983); *Houston v. Jewell Co., Inc.*, No. 85-C-10108, 1986 U.S. Dist. LEXIS 25835, at *3-6 (N.D. Ill. May 6, 1986). Other district courts reached the opposite conclusion. *See e.g. Tramble v. Converters Ink Co.*, 343 F. Supp. 1350, 1354 (N.D. Ill. 1972); *Persons v. United Parcel Services, Inc.*, 502 F. Supp. 1176, 1176 (N.D. Ga. 1980); *Ekanem v. Health and Hospital Corp. of Marion County*, No. 77-224-C, 1980 U.S. Dist. LEXIS 16002, at *66-67 (S.D. Ind. Nov. 28, 1980). At the circuit court level, however, there emerged a "general consensus . . . that section 1981 broadly prohibited discrimination in all contractual facets of the employment relationship, including 'post formation' adverse acts, such as retaliation." *Humphries*, 474 F.3d at 394. *See e.g. Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1268-70 (6th Cir. 1977); *Goff v. Continental Oil Co.*, 678 F.2d 593, 598 (5th Cir. 1982); *Choudhury v. Polytechnic Institute of New York*, 735 F.2d 38, 44 (2d Cir. 1984). The "general consensus" that existed among the circuits was short-lived.

B. *Patterson v. McLean Credit Union* - The Vacillation and Uncertainty Continues

This Court's 1989 decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) dramatically changed the doctrinal landscape of Section 1981. In *Patterson*, the Court confronted the question of whether a racial harassment claim was cognizable under Section 1981. It answered this question in the negative. In doing so, the Court vaguely defined for

the first time the parameters of Section 1981 in the employment context, namely the meaning of the phrase "to make and enforce contracts." According to the Court, Section 1981 means exactly what it says: the right to make contracts and the right to enforce contracts. *Patterson*, 491 U.S. at 176. The first right, the Court explained, "does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions." *Id.* at 177. The second right, the right to enforce contracts, was also narrowly and literally construed. This right, according to the Court, only protects against "*private* efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations." *Id.* at 177-78 (emphasis in original).

Patterson's textually sensitive construction swept from Section 1981's coverage "so called 'post-formation' discriminatory conduct of an employer." *Humphries*, 474 F.3d at 394. Naturally many of the circuit courts reversed course on the position they had taken post-*Sullivan* and concluded that retaliation, which they viewed as "post-formation" conduct, was not cognizable under Section 1981. *See e.g. McKnight v. GM Corp.*, 908 F.2d 104, 112 (7th Cir. 1990); *Gonzalez v. Home Ins. Co.*, 909 F.2d 716, 719-20 (2d Cir. 1990); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1313 (7th Cir. 1989); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1534-35 (11th Cir. 1990). However, not all of the circuits were convinced that *Patterson* foreclosed Section 1981 based retaliation claims. The Eighth Circuit in *Hicks v. Brown Group, Inc.*, 902 F.2d 630, 635 (8th Cir. 1989) held that a "claim for discriminatory discharge continues to be cognizable under Section 1981." Thus, despite the major

circuit shift, in the years following the Court's decision in *Patterson*, there was continued uncertainty.

C. The Civil Rights Act of 1991 - Continued Vacillation and Uncertainty

Two years after *Patterson*, Congress amended Section 1981 with the Civil Rights Act of 1991. The amended Section 1981 saw the addition of a new subsection, which reads:

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

42 U.S.C. § 1981(b). On its face, the new subsection does not mention retaliation or retaliatory termination. Nevertheless, the addition of subsection (b) prompted yet a second major shift in the circuits, with a number of courts modifying their post-*Patterson* position on the question. *Humphries*, 474 F.3d at 397 ("[t]he Civil Rights Act of 1991 led several circuits to reverse course (again) . . . "). To date, the Second, Fifth, Eighth, Ninth, and Eleventh circuits have directly addressed the issue. *See Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 693 (2d Cir. 1998); *Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 339 (5th Cir. 2003); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1059 (8th Cir. 1997); *Manatt v. Bank of America*, 339 F.3d 792, 800 (9th Cir. 2003); *Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1411 (11th Cir. 1998).

Despite the general shift in the circuits following the 1991 amendment, the vacillation and uncertainty has persisted.

The Eleventh Circuit, for instance, ruled in 1997 that a retaliation claim was not cognizable under Section 1981, but one year later appeared to change its mind. *Compare Little v. United Technologies, Carrier Transicold Div.*, 103 F.3d 956, 961 (11th Cir. 1997) (dismissing Section 1981-based retaliation claim because there was no evidence presented that the retaliation was motivated by racial animus) *with Andrews v. Lakeshore Rehab. Hosp., 140 F.3d 1405, 1411* (11th Cir. 1998) (deciding that retaliation was cognizable under Section 1981). The Seventh Circuit has followed a similar path since the 1991 amendment. *Compare Hart v. Transit Management of Racine, Inc.*, 426 F.3d 863, 866 (7th Cir. 2005) ("§ 1981, in contrast, encompasses only racial discrimination on account of the plaintiff's race and does not include a prohibition against retaliation for opposing racial discrimination . . .") *with Humphries*, 474 F.3d at 402 (recognizing that "our recent *Hart* decision appears to have created some confusion in the district courts and has already been misapplied in several decisions . . .," the court went on to "overrule our holding in *Hart* . . .").

There is confusion in other circuits. For instance, there is an apparent intra-circuit split in the Sixth Circuit. *Compare McCary v. Ohio Civil Service Employees Assoc.*, No. C2-99-995, 2000 U.S. Dist. LEXIS 21386, at *17 (S.D. Ohio Nov. 22, 2000) (citing *Day v. Wayne County Bd. of Auditors*, 749 F.2d 1199, 1204 (6th Cir. 1984) and holding that "a claim of retaliation is not cognizable under" Section 1981) *with Wagner v. Merit Distribution*, 445 F. Supp.2d 899, 906 (W.D. Tenn. 2006) ("§ 1981 is an appropriate ground for . . . [plaintiff's] retaliation claim"); *Cf Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 575 (6th Cir. 2000) (not directly addressing the issue of retaliation under Section 1981, but observing that "it is clear that a Caucasian high-level affirmative action official could bring a claim under § 1981.

. . for discrimination based upon his advocacy on behalf of minorities . . .").

REASONS FOR GRANTING THE WRIT

A. The Continued Vacillation and Uncertainty

This continued vacillation and uncertainty alone justifies review. *Calhoon v. Harvey*, 379 U.S. 134, 137 (1964) (granting *certiorari* because of "the importance of the questions presented and conflicting views in the courts of appeals and the district courts"); *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176 (1980) (*certiorari* granted "to forestall a possible conflict in the lower courts" on an "important" issue even though there was no "direct conflict" among various district court and court of appeals opinions). The time has come to settle the debate. Retaliation claims are being filed with greater frequency.[1] There is an apparent intra-circuit split in the Sixth Circuit. There are three other circuits that have not yet ruled on this issue. And, in those circuits that have found retaliation cognizable under Section 1981 since the 1991 amendments, the Seventh and Eleventh

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[1] Over a ten year period, the number of EEOC retaliation charges for all statutes has risen from 18,198 in 1997, to 22,555 in 2006. *EEOC Charge Statistics*, http://www.eeoc.gov/stats/charges.html (last viewed April 18, 2007). The number of EEOC charges based on the explicit retaliation clause in Title VII have risen from 16,394 in 1997 to 19,560 in 2006. *Id.* In fact, retaliation claims brought under various statutes now account for 29.8 percent of all charges brought before the EEOC, whereas such charges only accounted for 22.6 percent of retaliation claims in 1997. And, retaliation claims now account for 25.8 percent of all charges brought pursuant to Title VII, compared with 20.3 percent in 1997. *Id.*

Circuits have demonstrated that any one of these circuits could at any time unpredictably reverse course.

The unpredictability and uncertainty surrounding this issue is starkly highlighted by Judge Edmondson's comment about his circuit's decision in *Andrews* finding retaliation cognizable under Section 1981 when, just one year earlier, another three judge panel had reached the opposite conclusion: "[b]y the way, this view-- whether accurate or inaccurate -- of the law seems to have been prevalent in the federal courts nationwide." *Andrews*, 140 F.3d at 1413. This "follow-the-leader" mentality breads the type of uncertainty and vacillation that has plagued this issue in the forty years since *Sullivan*. Further delay by this Court will only perpetuate the historical uncertainty and vacillation.

B. The Text of Section 1981 Does Not Make Race Retaliation Actionable

Further delay will also tacitly endorse a construction of this major federal statute that entirely ignores its text. There is no dispute that Section 1981, either in its pre-amended or post-amended form, does not mention retaliation or retaliatory termination. Virtually every court that has addressed the issue concedes this point. *See e.g. Humphries*, 474 F.3d at 399 ("after all, the specific word 'retaliation' still does not appear in section 1981 . . ."); *Evans v. Kansas City, Missouri School Dist.*, 65 F.3d 98, 101 (8th Cir. 1995) ("[s]ection 1981 has no specific retaliation provision . . ."). In the absence of any textual support, the Court below relied heavily, if not exclusively, on what it claims is the legislative history. The Seventh Circuit specifically claimed that "the legislative history confirms that Congress intended retaliation to be included within Section 1981." *Humphries*, 474 F.3d at 398. Other circuits have made similar claims. *See e.g.*

Hawkins, 163 F.3d at 693 ("legislative history supports the view that this definition was intended to encompass both a race-based failure to promote and retaliation for a complaint of such a failure to promote").

The "legislative history" that purportedly evinces Congress' intent consists of one excerpt from a House committee report. The excerpt provides, in relevant part, that "[t]he Committee intends this provision to bar all race discrimination in contractual relations . . . [,][which] would include, but not be limited to, claims of harassment, discharge, demotion, promotion, transfer, retaliation, and hiring." H.R.Rep. No. 40(I), 102d Cong., 1st Sess. 92 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 630. Reliance on legislative history, particularly the legislative history from this committee report, is inappropriate for two reasons.

First, legislative history cannot be used as a substitute for the statutory text. This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992) (citations and internal quotations omitted) (Thomas, J.). Meaning is derived from the text, not legislative history. The text is preferred over legislative history because the latter is unreliable and misleading. For instance, legislative history, like committee reports, "has addictive consequences," leading jurists to naively believe "that what is said by a single person in a floor debate or by a committee report represents the view of Congress as a whole - so that we sometimes even will say (when referring to a floor statement and committee report) that 'Congress has expressed' thus-and-so." *Zedner v. United States*, 126 S.Ct. 1976, 1991 (2006) (Scalia, J., concurring). Worse yet, reliance on legislative history gives "unelected staffers and lobbyists . . . both the power and the incentive to

attempt strategic manipulations of legislative history to secure results that they were unable to achieve through the statutory text." *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005) (Kennedy, J.). Legislative history is also subject to manipulation, conscious or otherwise. As Justice Kennedy explained in *Exxon Mobil*, for the jurist, "investigation of legislative history has a tendency to become . . . an exercise in looking over a crowd and picking out your friends." *Id.* (internal quotations removed).

The text thus retains primacy when interpreting federal statutes. Legislative history should not and cannot be consulted in the face of "unambiguous text." *Arlington Central School Dist. Board of Educ. v. Murphy*, 126 S.Ct. 2455, 2463 (2006) (Alito, J.). Section 1981 is no exception. *Domino's Pizza, Inc. v. McDonald*, 126 S. Ct. 1246 (2006) (interpreting Section 1981 from a textualist perspective) (Scalia, J.). "The authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp.*, 545 U.S. at 568. And "[w]hatever temptations the statesmanship of policymaking might suggest, the judge's job is to construe the statute - not make it better." *Jones v. Bock*, 127 S. Ct. 910, 921 (2007) (Roberts, J.). If the statute needs to be made "better," that is a task for Congress, not the courts. *Interview with Chief Justice Roberts*, University of Miami (Nov. 13, 2006) (explaining the importance of constrained decision-making and noting that "[n]ot a single person has voted for me, and if we don't like what the people in Congress do, we can get rid of them, and you don't like what I do, it's kind of too bad . . ."). Had the Seventh Circuit (and the other circuit courts) followed this methodological approach to statutory interpretation, as this Court demands, it would have invariably concluded that retaliation is not cognizable under Section 1981. There is

simply nothing in the text of Section 1981(a) or (b) to support any other conclusion.

At its core, Section 1981 "protects the equal right of 'all persons . . . to make and enforce contracts' without respect to race." *Id.* at 1250. With the 1991 amendment, the phrase "make and enforce" now includes the making (which is not new), performing, modifying, and terminating (also not new) of a contract. In amending Section 1981, Congress did not strip it of its fundamental underpinnings, leaving intact the necessary motivational prerequisite to bringing a claim under this section. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 311-12 (1994) ("*Patterson* did not overrule any prior decision of this Court"). Even though amended, therefore, an employer's conduct will not be actionable under Section 1981 unless its conduct was "racially motivated." *Runyon v. McCarey*, 427 U.S. 160, 168 (1976) ("[i]t is now well established that s 1 of the Civil Rights Act of 1866 . . . prohibits racial discrimination in the making and enforcement of private contracts"); *General Building Contr. Assoc.*, 458 U.S. at 389 ("§ 1981 reaches only purposeful discrimination"); *Georgia v. Rachel*, 384 U.S. 780, 791 (1966) ("Congress intended to protect a limited category of rights, specifically defined in terms of racial equality"). From a textualist perspective, this means that, in the employment context, Section 1981 protects the equal right of all persons (or employees) without regard for race to make, perform, modify, and terminate a contract. Employer actions that are not racially motivated are necessarily lawful under Section 1981.

Retaliatory terminations are, of course, not racially motivated. *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 185 (2005) ("[a] claim of retaliation is not a claim of discrimination on the basis of [race]") (Thomas, J.,

dissenting). The motivation behind the retaliatory termination, by definition, is the protected activity, which in most situations is some form of complaint. *See e.g. Humphries*, 474 F.3d at 404 (to prevail on a retaliation claim, plaintiff must prove that there is a "causal connection between" the termination and the "protected activity"). The complaining party's race has nothing to do with the termination. In fact, under a retaliation theory, but for the employee's complaint, the employee, whether white or black, would not have been terminated. Under a discriminatory termination theory, on the other hand, but for the employee's race, the employee would not have been terminated. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (to prove discriminatory termination requires that the employee's race "actually played a role in the [decisionmaking process] and had a determinative influence on the outcome").

This obvious conceptual distinction between retaliatory termination and discriminatory termination was even accepted by the court below, which noted that "it may be that, strictly speaking, a discriminatory termination of a contract is not the same thing as a retaliatory discharge -- for instance, analytically, retaliation need not have a discriminatory intent behind it." *Humphries*, 474 F.3d at 398; *see also Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989) ("retaliation and discrimination are separate wrongs"). Consequently, although a discriminatory termination is prohibited by Section 1981, a retaliatory termination is not. *Domino's Pizza*, 596 S.Ct. at 1249 ("Congress amended the statute . . . adding § 1981(b), which defines 'make and enforce' to bring post formation conduct, including discriminatory termination, within the scope of § 1981"). The text of the statute and the plain meaning of the terms in that statute demand this result. The legislative history cannot be used to reach a result that is not, at all, tethered to the text

of Section 1981. The Seventh Circuit obviously decided to ignore this basic tenet of Supreme Court jurisprudence, providing yet another reason for granting *certiorari*. *Army & Air Force Exchange Serv. v. Sheehan*, 456 U.S. 129, 130 (1959) (granting *certiorari* because the decision below "appeared to be in conflict with our precedents"); Rehnquist, THE SUPREME COURT - HOW IT WAS, HOW IT IS 265 (1987) (recognizing that, in determining whether to grant *certiorari*, "another important factor is the perception of one or more justices that the lower court decision may well have been an incorrect application of Supreme Court precedent").

There is a second and more obvious reason that reliance on the legislative history is inappropriate: the "legislative history" in this case actually contradicts the Seventh Circuit's holding. Congress was certainly aware of the interpretive norm employed by the Court at the time it amended Section 1981. *Humphries*, 474 F.3d at 411 (Easterbrook, J., dissenting). For instance, *Patterson*, the very case that Congress sought to address with the 1991 amendment, was the product of a strict text-based interpretation. *See e.g. Patterson*, 491 U.S. at 176 (construing Section 1981 by looking to "its plain terms . . ."); *Humphries*, 474 F.3d at 395 (recognizing that *Patterson* "severely curtailed the reach of section 1981 claims"). Yet Congress failed to include retaliation in the text of subsection (b), no doubt realizing that it would not be read into the statute by a Court that abandoned some time ago judicial extrapolation of federal statutes. Moreover, the House committee report that supposedly shows the intent of Congress delineated the types of employer actions that would be covered by the new subsection (b). Not one of these actions is mentioned in the amended Section 1981, again, despite the very real possibility that the prevailing interpretive norm would prevent these words from being read into the amended version of Section 1981.

Perhaps most revealing is the explicit inclusion by Congress of retaliation in other federal employment statutes. Both before and after the 1991 amendment, Congress has included explicit retaliation provisions in a number of other statutes governing employment including Title VII, the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, the Fair Labor Standards Act of 1938, the Family and Medical Leave Act of 1993, and the Uniformed Services Employment and Reemployment Rights Act of 1994. This is telling because "when Congress intends to include a prohibition against retaliation in a statute, it does so." *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 190 (2005) (Thomas, J., dissenting). These peculiar facts lead to only one logical conclusion: whether the product of compromise or a change-of-heart, Congress in 1991 did not intend to include retaliation in Section 1981.

With no support in the text or the legislative history, the Seventh Circuit and the courts that preceded it have reached a conclusion that is simply wrong. An erroneous construction of a major federal statute, particularly one that strays so far afield from this Court's precedents and interpretive norms cannot stand. The Court should thus exercise its supervisory authority and grant *certiorari*. *Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) ("[a]s the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation") (Stevens, J., dissenting); *Elder v. Holloway*, 510 U.S. 510, 505 (1994) (granting *certiorari* where the decision below "seemed to be out of line with the authorities").

C. The Seventh Circuit's Holding Effectively Eviscerates Several Portions of Title VII

Title VII has several unique features not shared with Section 1981. *Humphries*, 474 F.3d at 409 ("§ 1981 and Title VII have different but overlapping provisions . . .") (Easterbrook, dissent). Title VII has an exhaustion requirement and an administrative conciliation and mediation process. It has two interrelated statute of limitations periods. It also imposes caps on damages. And, perhaps most importantly, Title VII established an administrative agency, the Equal Employment Opportunity Commission, to "protect the public interest and further our national initiative against employment discrimination . . . ." *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 459 (6th Cir. 1998). Section 1981 contains none of these features.

The Seventh Circuit's holding quite obviously allows would-be plaintiffs to circumvent these features of Title VII by reading "§ 1981 to have the same substantive content as Title VII, but without [the] features" that "Congress thought necessary." *Humphries*, 474 F.3d at 409. The Respondent in this case did just that after missing the filing deadline under Title VII. *Id.* at 389. And, as Judge Easterbrook astutely pointed out below, "[t]his is not the first time a disgruntled employee has turned to § 1981 after missing the deadline for litigation under Title VII." *Id.* at 409. If the Seventh Circuit's decision is not reversed, employees will be able to bypass the EEOC and go right to court long after Title VII's statute of limitations period has run, without any meaningful opportunity for conciliation and mediation. This would not be inconsequential. Since 1997, the EEOC has successfully conciliated over 4000 disputes. *EEOC Charge Statistics,* https://www.eeoc.gov/stats.html (last viewed April 18, 2007). Another 10,881 disputes were otherwise settled with the

EEOC during that same time period. *Id.* The Seventh Circuit's decision could flood the federal courts with cases that might have been resolved at the administrative level.

Patterson advises against a construction of Section 1981 that facilitates such a result. *Patterson*, 491 U.S. at 182 ("[w]e should be reluctant . . . to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute"). This is particularly true where the circumvented statute provides coverage, as is the case here. *Id.* ("the availability of the latter statute [Title VII] should deter a tortuous construction of the former statute [Section 1981] to cover this type of claim"). Courts must not be permitted to "undo the work of Congress . . ." based on one statement in one committee report. *Frank's Nursery & Crafts, Inc.*, 177 F.3d at 459. Indeed, as this Court has made clear, "repeals by implication are not favored," permissible only when "the two statutes are in irreconcilable conflict." *Branch v. Smith*, 538 U.S. 254, 272 (2003). As already explained above, Title VII and Section 1981 are not in irreconcilable conflict. The two are only in conflict because of the circuit courts' atextual and unacceptably "tortuous" interpretation of Section 1981. This Court should grant *certiorari* and put an end to the senseless conflict by articulating a proper textual application of Section 1981.

CONCLUSION

A writ of *certiorari* should be issued to review the judgment and opinion of the Seventh Circuit Court of Appeals. If *certiorari* is not granted, the Court runs the risk of perpetuating the vacillation and uncertainty that has plagued this issue for forty years. The Court would also run the risk of tacitly endorsing an atextual construction of a

major federal statute that "demolishes components of Title VII that Congress thought necessary to expedite the resolution of disputes and resolve many of them out of court." *Humphries*, 474 F.3d at 409.

Respectfully submitted,

MICHAEL W. HAWKINS
MICHAEL J. NEWMAN
Counsel for Petitioner
DINSMORE & SHOHL LLP
Suite 1900
255 East Fifth Street
Cincinnati, Ohio 45202
Telephone: (513) 977-8200
Facsimile: (513) 977-8141
michael.hawkins@dinslaw.com
michael.newman@dinslaw.com

Date: April 25, 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 05-4047

[Filed January 29, 2007]

HEDRICK G. HUMPHRIES,)
Plaintiff-Appellant,)
)
v.)
)
CBOCS WEST, INC.,)
Defendant-Appellee.)
)

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 03-C-3765
Charles P. Kocoras, Judge.

ORDER

On consideration of the petition for rehearing filed by Defendant-Appellee on January 24, 2007, all members of the original panel have voted to Deny the petition for rehearing.

Accordingly, the petition for rehearing is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 05-4047

[Filed January 10, 2007]

HEDRICK G. HUMPHRIES, *Plaintiff-Appellant*,

v.

CBOCS WEST, INC., *Defendant-Appellee*.

OPINION

WILLIAMS, *Circuit Judge*. Hedrick Humphries filed a suit alleging claims of discrimination and retaliation under Title VII and 42 U.S.C. § 1981 against CBOCS West, Inc., based upon his discharge as an associate manager at one of defendant's Cracker Barrel restaurants. After dismissing Humphries's Title VII claims as procedurally barred, the district court granted summary judgment in favor of CBOCS West, Inc. (hereinafter "Cracker Barrel"), holding that Humphries could not establish his prima facie burden of showing that a similarly situated individual in a non-protected class was treated more favorably. We reverse the district court's grant of summary judgment as to Humphries's

retaliation claim because Humphries made a sufficient showing under the indirect method to establish a prima facie case of retaliation under section 1981. We affirm the judgment as to Humphries's discrimination claim because Humphries forfeited this claim by failing to present an adequate argument before the district court.

I. BACKGROUND

The following facts are recounted in the light most favorable to Humphries, the non-movant. Humphries, an African-American male, was an associate manager at a Cracker Barrel restaurant in Bradley, Illinois. Associate managers at Cracker Barrel are supervised by a general manager, who in turn is supervised by a district manager. In this case, three general managers cycled through during Humphries's three-year tenure: Don Sessions, Steve Cardin and Ken Dowd. His performance during his first two-and-a-half years (roughly February 1999 through mid-July 2001) was generally excellent. For instance, he received annual merit raises and bonuses, and his supervisor (Sessions) testified that he considered Humphries to be his best associate manager. Circumstances changed for Humphries when Cardin took over (as a temporary replacement) for Sessions. According to Humphries, Cardin routinely made racially derogatory remarks, such as stating that all African-Americans are "drunk or high on drugs" or that "all Mexicans have a bunch of kids." Humphries alleges that other employees confirmed Cardin's inappropriate comments, and told Humphries that Cardin had stated that he was there "for the white people" and was "going to take care of the white people."

Within Cardin's initial month of being the general manager, he issued Humphries five disciplinary reports,

called Employee Counseling Reports (ECRs). The ECRs covered a wide range of alleged misconduct, including bank deposit shortages and inappropriate use of Gold Cards to provide complaining customers a free meal. Humphries claims that the ECRs were groundless and reflected Cardin's racial animus. In response, in August or September 2001, Humphries complained to Cardin's supervisor, district manager William Christensen. Christensen, however, appears not to have conducted any investigation of Humphries's claims, contrary to Cracker Barrel policies.

In September 2001, Ken Dowd became general manager (Cardin returned, as planned, to his store). Shortly thereafter, Joe Stinnett, one of Humphries's fellow associate managers, fired an African-American food server, Venis Green, because she purportedly failed to show up for a shift. Humphries complained to both Dowd and Christensen that Stinnett's firing of Green was discriminatory because, among other things, Green had informed both Humphries and another associate manager that she could not work that shift. Moreover, according to Humphries, a white employee had failed to appear at work on several occasions without notice, but was not fired. Humphries also reminded Christensen of his earlier complaints regarding former-general manager Cardin. According to Humphries, Christensen berated him for "going outside the management group" (i.e., turning to Christensen, rather than Dowd, to complain) and demanded that Humphries schedule a meeting with Dowd for the following week.

This scheduled meeting never occurred because on December 5, 2001 (the day before Humphries's scheduled meeting with Dowd), Christensen fired Humphries, based upon Stinnett's complaint that Humphries had left the store safe unlocked during the evening -- a charge that Humphries

disputes. Humphries also claims that prior to his firing (and before his alleged failure to lock the safe), a cashier warned him that he should watch himself because Christensen and Stinnett were "up to something." After being informed by Stinnett that Humphries had left the safe unlocked, Christensen immediately terminated Humphries - without interviewing him or investigating the incident to determine whether Humphries had actually left the safe open.

Humphries subsequently brought claims of discrimination and retaliation under Title VII and section 1981. The district court dismissed Humphries's Title VII claims due to procedural deficiencies (and Humphries does not appeal this determination). The district court also granted summary judgment in favor of Cracker Barrel on Humphries's section 1981 claims, finding that Humphries failed to establish his prima facie case under either the direct or indirect method. Humphries now appeals.

II. ANALYSIS

A. Historical Overview of Retaliation Claims under Section 1981

Before we turn to the merits of this appeal, we must decide whether Humphries's retaliation claim is cognizable under section 1981. Although Cracker Barrel failed to raise this issue in the district court, it now claims that our decision in *Hart v. Transit Management of Racine, Inc.*, 426 F.3d 863 (7th Cir. 2005), precludes Humphries's retaliation claim. In the normal course, when a party fails to present an argument in the trial court, it forfeits the argument on appeal. *See Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 728 (7th Cir. 2004); *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 107-10 (7th Cir. 1990). At oral argument, counsel

for Cracker Barrel explained that he did not raise this issue in the district court because *Hart*, which he contended created a change in the law in this circuit, had not yet been issued. Although (as we will explain later), we do not believe that *Hart* changed our jurisprudence regarding section 1981 retaliation claims, we will not penalize Cracker Barrel for failing to raise its argument below.[1]

Of course, we retain the right to consider forfeited arguments, and may choose to do so "in the interests of justice." *Mass. Bay Ins. Co. v. Vic Koenig Leasing, Inc.*, 136 F.3d 1116, 1122 (7th Cir. 1998); *see also Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 749-50 (7th Cir. 1993) (holding that "[i]n the rare case in which failure to present a ground to the district court has caused no one -- not the district judge, not us, not the appellee -- any harm of which the law ought to take note, we have the power and the right to

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[1] We note that there is some confusion in this circuit as to whether an appellee -- as opposed to an appellant -- who failed to raise to a particular argument in the district court in support of his motion for summary judgment is precluded from raising new arguments in this court to affirm the district court's ruling. *Compare, e.g., Gray v. Lacke*, 885 F.2d 399, 409 (7th Cir. 1989) (holding that appellees waived a claim by failing to raise it in the district court), *and Baskin v. Clark*, 956 F.2d 142, 146 (7th Cir. 1992) (same), *with Transamerica Ins. Co. v. South*, 125 F.3d 392, 399 (7th Cir. 1997) ("We certainly agree that the failure of an appellee to have raised all possible alternative grounds for affirming the district court's original decision, unlike an appellant's failure to raise all possible grounds for reversal, should not operate as a waiver. The urging of alternative grounds for affirmance is a privilege rather than a duty." (quoting *Schering Corp. v. Ill. Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996))). We need not resolve this question because we choose to review this issue, irrespective of whether Cracker Barrel forfeited the issue or not.

permit it to be raised for the first time to us"). In this instance, given that our recent *Hart* decision appears to have created some confusion in the district courts and has already been misapplied in several decisions, it is in the interests of justice to clarify the issue of whether retaliation claims are cognizable under section 1981 (and, in so doing, clarify our ruling in *Hart*). *See Amcast*, 2 F.3d at 749-50 (reaching issue not raised below because it was fully briefed on appeal, rested "entirely on a pure issue of statutory interpretation, as to which the district judge's view, while it would no doubt be interesting, could have no effect on our review, which is plenary on matters of law[, and] there is no reason to defer its resolution to another case. There will be no better time to resolve the issue than now."); *Mass. Bay Ins. Co.*, 136 F.3d at 1122 (reaching forfeited choice-of-law issue because "we clearly think it is in the interest of justice to insure that district courts conduct choice-of-law analyses when conflicts questions are presented to them").

1. Section 1981's Origin in the Civil Rights Act of 1866

The language codified in section 1981 derives from section 1 of the Civil Rights Act of 1866, a Reconstruction-era statute that is generally recognized as the first significant civil rights legislation enacted by Congress, and is considered the "initial blueprint of the Fourteenth Amendment." *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 389, 102 S. Ct. 3141, 73 L. Ed. 2d 835 (1982); *see generally Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422-37, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968) (discussing legislative history and historical context of the Civil Rights Act of 1866); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 711-22, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989)(same); *Patterson v. McLean Credit Union*, 491 U.S. 164, 192-200, 109 S. Ct.

2363, 105 L. Ed. 2d 132 (1989) (Brennan, J., concurring in part and dissenting in part) (same); Robert J. Kaczorowski, Comment, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary*, 98 Yale L.J. 565 (1989). The legislative history of the Civil Rights Act of 1866 is complicated -- and not without substantial interpretive disagreement. *See generally* George Rutherglen, *The Improbable History of Section 1981: Clio Still Bemused and Confused*, 2003 Sup. Ct. Rev. 303. The Civil Rights Act of 1866 was passed pursuant to section 2 of the Thirteenth Amendment, which provided Congress with the legislative power to enforce the Thirteenth Amendment's prohibition on slavery. U.S. Const. amend. XIII, § 2. The Act was a direct response to the so-called "Black Codes," a series of legislative acts by many southern (and some northern) states in protest of, and as a tacit attack upon, the recently enacted Thirteenth Amendment. The Black Codes imposed onerous legal limitations on newly-freed former slaves in an attempt to circumvent the requirements of the Thirteenth Amendment, and essentially continued a pattern of legal enslavement. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70, 21 L. Ed. 394 (1873) (noting that following the passage of the Thirteenth Amendment, "[a]mong the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value"); *see generally* Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 Harv. J. on Legis. 187, 240-46 (2005) (discussing the Black Codes).

In response to the states' attempts to circumvent the requirements of the Thirteenth Amendment, section 1 of the Civil Rights Act of 1866 conferred a series of legal rights, including the right to contract, and to hold and convey property, equally to citizens.[2] Portions of section 1 are now codified in section 1981, which states, in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

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[2] In 1870, after ratification of the Fourteenth and Fifteenth Amendments, Congress re-enacted the Civil Rights Act of 1866 (via the Enforcement Act of 1870), and then codified it in sections 1977 and 1978 of the Revised Statutes of 1874. The 1870 re-enactment, which followed passage of the Fourteenth Amendment, has caused significant debate regarding whether sections 1981 and 1982 apply to private actors or, instead, are limited to state actors, pursuant to the Fourteenth Amendment. *Compare, e.g., Jones*, 392 U.S. at 436 (concluding that "it certainly does not follow that the adoption of the Fourteenth Amendment or the subsequent re-adoption of the Civil Rights Act were meant somehow to limit its application to state action"), *and Runyon v. McCrary*, 427 U.S. 160, 168-69 n.8, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976) (same), *with Jones*, 392 U.S. at 449-76 (Harlan, J., dissenting) (evaluating the legislative history and concluding that the Act was intended to reach only state actors), *and Runyon*, 427 U.S. at 195-205 (White, J., dissenting) (same). In any event, it is now well-settled that section 1981 applies to private actors. *See Patterson*, 491 U.S. at 171-76 (refusing to overturn *Runyon*'s determination that section 1981 applied to private conduct).

42. U.S.C. § 1981(a). Other portions of section 1 are now codified in section 1982, which states:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1982.

2. *Sullivan v. Little Hunting Park, Inc.* Leads Courts To Conclude that Section 1981 Protects Against Retaliation

The Supreme Court has interpreted section 1981 as providing a broad-based prohibition (and federal remedy) against racial discrimination in the making and enforcing of contracts. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459-62, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975). The issue of what types of adverse actions are subsumed under the "make and enforce contracts" provision in section 1981 is not without complication, particularly with respect to so-called "postformation conduct" (i.e., adverse acts, such as harassment or retaliation, that occur after an initial contractual relationship has been established). Before its decision in *Patterson*, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (which we shall address below), the Supreme Court had not clearly determined whether section 1981 applied to retaliatory conduct. The closest it came to deciding this issue was in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969). In *Sullivan*, a Virginia nonprofit corporation, created to operate a community park and playground facilities for the benefit of residents, refused a proposed assignment of

a membership interest to an African-American man. *Id.* at 234-35. The white homeowner who intended to assign his membership interest protested the corporate board's refusal, and the board expelled him from the corporation. *Id.* at 235. He, along with the would-be assignee, brought suit under sections 1981 and 1982. *Id.* The Court initially noted the "broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866, 14 Stat. 27, from which § 1982 was derived." *Id.* at 237. Relying on the broad protective nature of the Civil Rights Act of 1866, the Court held that the white homeowner had standing to bring a claim under section 1982 (the companion statute to section 1981 pertaining to property rights):

> We turn to Sullivan's expulsion for the advocacy of Freeman's cause. If that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property. That is why we said in *Barrows v. Jackson*, 346 U.S. 249, 259, 73 S. Ct. 1031, 1036, 97 L. Ed. 1586, that the white owner is at times "the only effective adversary" of the unlawful restrictive covenant. Under the terms of our decision in *Barrows*, there can be no question but that Sullivan has standing to maintain this action.

Id. at 237. Although the *Sullivan* court did not explicitly use the term "retaliation" in its decision, it was clear that the white landowner's basis for standing was that he had suffered retaliation for asserting the rights of another (i.e., he had been "punished for trying to vindicate the rights of minorities"). *Id.* (And, indeed, as will be discussed further below, the Supreme Court later interpreted *Sullivan* precisely in this

manner in *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005).)

Following *Sullivan*, and prior to *Patterson*, the general consensus among the circuits was that section 1981 broadly prohibited discrimination in all contractual facets of the employment relationship, including "postformation" adverse acts, such as retaliation. *See, e.g.*, *Choudhury v. Polytechnic Inst. of New York*, 735 F.2d 38, 42-43 (2d Cir. 1984) (retaliation cognizable under section 1981); *Goff v. Continental Oil Co.*, 678 F.2d 593, 597-99 (5th Cir. 1982) (same); *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1268-70 (6th Cir. 1977) (same); *Setser v. Novack Inv. Co.*, 638 F.2d 1137, 1147 (8th Cir. 1981) (same); *London v. Coopers & Lybrand*, 644 F.2d 811, 819 (9th Cir. 1981) (same). This court, however, did not definitively decide this issue in the pre-*Patterson* era. *See Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1313 (7th Cir. 1989) (noting that although "[t]here is a substantial body of court of appeals precedent" holding that section 1981 forbids retaliation, there was "nothing in this circuit").

3. *Patterson v. McLean Credit Union* Narrows the Reach of Section 1981

In 1989, the Supreme Court issued its decision in *Patterson*, which severely curtailed the reach of section 1981 claims. The *Patterson* court held that section 1981 protections applied exclusively to two types of rights: the right to make contracts and the right to enforce them. 491 U.S. at 176. The first right is violated by a "refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms." *Id.* at 177. Importantly, however, that right "extends only to the formation of a contract, but not to problems that may arise later from the conditions of

continuing employment." *Id.* at 176. The second right, the right to enforce contracts, "does not. . . extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights." *Id.* at 177-78. Thus, section 1981's prohibition did not include so-called "postformation" discriminatory conduct of an employer, including the breach of the terms of the contract or imposition of discriminatory working conditions, such as racial harassment. *Id.* at 178-82. *Patterson*, however, was silent as to the issue of retaliation.

Even though *Patterson* involved only racial harassment and the term "retaliation" appears nowhere in the opinion, several circuits -- including this one -- interpreted *Patterson* as precluding retaliation claims under section 1981 because such employer behaviors purportedly involved now-unprotected postformation conduct. *See, e.g., Gonzalez v. Home Ins. Co.*, 909 F.2d 716 (2d Cir. 1990); *Carter v. South Cent. Bell*, 912 F.2d 832, 838-41 (5th Cir. 1990); *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 107-10 (7th Cir. 1990); *Courtney v. Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845, 849 (9th Cir. 1990); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1535 & n.17 (11th Cir. 1990); *Gersman v. Group Health Ass'n, Inc.*, 289 U.S. App. D.C. 332, 931 F.2d 1565 (D.C. Cir. 1991); *see also Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 339 (5th Cir. 2003) (noting that *Patterson* "marked a dramatic change in § 1981 jurisprudence"); *but see Hicks v. Brown*, 902 F.2d 630, 635-38 (8th Cir. 1990) (holding that *Patterson* did not address retaliation claims and should not be read as foreclosing such claims under section 1981). In the immediate aftermath of *Patterson*, we decided *Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989), in which we observed that "*Patterson* might be thought to foreclose any suggestion that retaliation could be actionable under" section 1981. *Malhotra*, 885 F.2d

at 1312. Specifically, we noted that "retaliation and discrimination are separate wrongs. A white person who opposes discrimination against blacks and is fired in retaliation for doing so is not being discriminated against because of his race. . . ." *Id.* (citations omitted). At the same time, we also observed that "it can be argued that someone who retaliates against a person who has a claim of employment discrimination that might be actionable under section 1981 ... is interfering with the person's *ability* to make or enforce contracts on the same footing with white persons and such interference could be thought itself a violation of section 1981." *Id.* at 1313 (citations omitted) (emphasis in original). Of particular note here, we did not decide whether *Patterson* definitively precluded retaliation claims, and even hinted that such claims "may well survive *Patterson*." *Id.*

In a concurring opinion in *Malhotra*, Judge Cudahy concluded that *Patterson* did not preclude retaliation claims.[3] Specifically, Judge Cudahy observed that there was "little parallel between harassment and retaliation. Hence, the refusal of *Patterson* to countenance harassment claims under section 1981 has only the most superficial application to claims for retaliation."[4] *Id.* at 1314 (Cudahy, J., concurring);

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[3] *See also Mozee v. Am. Commercial Marine Serv. Co.*, 940 F.2d 1036, 1053 (7th Cir. 1991) (suggesting that *Patterson* may not have foreclosed all retaliation claims).

[4] Judge Cudahy also noted that "to the limited extent *Patterson* is relevant here, it would appear to *support* the recognition of a cause of action for retaliatory conduct" because the *Patterson* court recognized that section 1981's right to "enforce contracts" prohibits efforts to "impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding

see also Hicks, 902 F.2d at 635-38 (holding that *Patterson* applied solely to the unique context of racial harassment and did not preclude retaliation claims). And, in prescient comments that anticipated the Supreme Court's result in *Jackson*, 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361, Judge Cudahy stated:

> A prohibition against retaliation is a necessary adjunct to the anti-discriminatory provision itself. If an employee may be fired for complaining of discrimination, his right not to be discriminated against is surely vitiated. . . . The recognition of a right of action for retaliation under section 1981 is simply another application of a straightforward syllogism: if an employee is granted certain substantive rights against his or her employer, the employer may not punish the employee's assertion of those rights, since this would allow the employer to take away a right to protection conferred by statute.

Id. at 1314-15.

Judge Cudahy's view in *Malhotra* did not carry the day in this circuit during the brief post-*Patterson* era. Shortly thereafter, we issued our *McKnight* decision, where we, like most other circuits, interpreted *Patterson* as foreclosing section 1981 coverage of retaliation claims. *See McKnight*,

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obligations." *Malhotra*, 885 F.2d at 1314 n.1 (citations omitted). "Clearly, when an employer punishes an employee for attempting to enforce her rights under section 1981, this conduct 'impairs the employee's ability to enforce her contract rights.'" *Id.* This is an intriguing argument, but one that we need not revisit in light of our conclusion that retaliation claims are now covered under section 1981's "make and enforce contracts" provision.

908 F.2d at 107-08; *see also Von Zuckerstein v. Argonne Nat'l Lab.*, 984 F.2d 1467, 1471-72 (7th Cir. 1993); *McCarthy v. Kemper Life Ins. Co.*, 924 F.2d 683, 688 (7th Cir. 1991). *But see Hicks*, 902 F.2d at 635-38 (holding that *Patterson* did not foreclose retaliation claims). In *McKnight*, the plaintiff brought suit under section 1981 and Title VII, claiming that his employer had discriminated against him based on his race and had fired him in retaliation for complaining about the discrimination. *McKnight*, 908 F.2d at 107-08. Although we noted that "*Patterson* was a racial-harassment case rather than a discharge case," we nonetheless held that *Patterson*'s "wide-ranging reexamination of section 1981 indicated (as it seems to us) that claims of racially motivated discharge are not actionable under that statute." *Id.* at 108.

Judge Fairchild, however, concurred and dissented in part from the majority's opinion, because, in his view, *Patterson* "did not expressly assert that a racially discriminatory termination would not be a violation of § 1981." *Id.* at 117. Instead, he reasoned that the analysis in *Patterson* was limited to the narrow issue of whether a change in the conditions of employment following the formation of the employment contract (specifically, racial harassment) -- but not a termination -- violated section 1981. *Id.* As a result, Judge Fairchild concluded that the right to make contracts established in section 1981 protected "the right to continue to work, in the face of racially discriminatory termination" -- a result unaltered by *Patterson*. *Id. But see Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994) (noting that "*Patterson* did not overrule any prior decision of this Court; rather, it held and therefore established that the prior decisions of the Courts of Appeals which read § 1981 to cover discriminatory contract termination were *incorrect*." (emphasis in original)).

4. The Civil Rights Act of 1991 Supersedes *Patterson*

Whether the majority opinion in *McKnight* or Judge Cudahy's or Judge Fairchild's reading of *Patterson* was correct is now irrelevant because *Patterson* 's influence was short-lived. Unhappy with the result issued in *Patterson*, Congress legislatively superseded the *Patterson* decision by enacting the Civil Rights Act of 1991. *See Rivers*, 511 U.S. at 305-06, 305 n.5 (noting that the Civil Rights Act of 1991 was based on Congressional and Presidential disapproval of the *Patterson* decision); *Walker v. Abbott Labs.*, 340 F.3d 471, 475 (7th Cir. 2003) (noting that "Congress, however, quickly responded [to *Patterson*] with the Civil Rights Act of 1991, which, *inter alia*, overruled *Patterson*"). The legislative history of the Civil Rights Act of 1991 makes clear that Congress was dissatisfied with the Supreme Court's narrow reading of section 1981, which strongly curtailed claims that had been cognizable in the pre-*Patterson* period. *See Rivers*, 511 U.S. at 306 n.6 (citing S. Rep. No. 101-315, pp. 12-14 (1990)). Among other things, Congress added subsection (b) to section 1981, which made clear that section 1981 was to be read broadly to include all aspects of the contractual relationship between parties, including the postformation conduct, which *Patterson* had concluded was not actionable under section 1981:

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

42 U.S.C. § 1981(b). And the legislative history pertaining to this subsection confirms that Congress intended retaliation to

be included under this provision. *See Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1411 n.12 (11th Cir. 1998) (citing H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 92 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549, 630, which states, in part, "[t]he list set forth in subsection (b) is intended to be illustrative rather than exhaustive. In the context of employment discrimination, for example, this would include, but not be limited to, claims of harassment, discharge, demotion, promotion, transfer, *retaliation*, and hiring." (emphasis added)).

The Civil Rights Act of 1991 led several circuits to reverse course (again) and to allow retaliation claims under section 1981. *See Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 339 (5th Cir. 2003); *Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 693 (2d Cir. 1998); *Andrews*, 140 F.3d at 1412-13; *see also Barge v. Anheuser-Busch, Inc.*, 87 F.3d 256, 259 (8th Cir. 1996) (listing the elements for a *prima facie* case of retaliation under section 1981). For instance, in *Andrews*, the Eleventh Circuit noted that prior to *Patterson*, circuits interpreting section 1981's "make and enforce contracts" provisions had held that it "encompassed an employee's claims for an employer's race-based retaliation during the employment contract." 140 F.3d at 1410. It observed that while *Patterson* "drew into question many circuit court decisions recognizing post-hiring discrimination claims under section 1981," the Civil Rights Act of 1991 reversed whatever limits *Patterson* placed on imposing liability for postformation conduct. *Id.* at 1410-12. As a result, the Eleventh Circuit concluded that retaliation claims remained viable under section 1981. *Id.* at 1412.

B. Humphries's Retaliation Claim Is Cognizable Under Section 1981

1. We Hold that Section 1981 Protects Against Retaliation

This is the first opportunity we have had since the enactment of the Civil Rights Act of 1991 to revisit the issue of whether section 1981 forbids all retaliatory discharge claims.[5] Cracker Barrel contends that our decision in *Hart* has already foreclosed retaliation claims under section 1981. *See Hart*, 426 F.3d at 866. This is incorrect. Unfortunately, *Hart* has already been cited for this inaccurate proposition. *See Williamson v. Denk & Roche Builders, Inc.*, No. 04 C 4051, 2006 WL 1987808, at *4 (N.D. Ill. July 11, 2006) (citing *Hart* for the proposition that "the Seventh Circuit has made clear that a retaliation claim is not viable under Section 1981");

Franklin v. U.S. Steel Corp., No. 2:04 CV 246, 2006 U.S. Dist. LEXIS 17802 at *6, 2006 WL 905914, at *2 (N.D. Ind. Apr. 7, 2006) (same); *Welzel v. Bernstein*, 436 F. Supp. 2d 110, 117 (D.D.C. 2006) (citing *Hart* for the proposition that this circuit, unlike other circuits, precludes retaliation claims under section 1981). Our analysis in *Hart* was limited to the narrow issue of whether an individual who was *not* the subject of discrimination could assert claims of

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[5] In *Von Zuckerstein v. Argonne Nat'l Lab.*, 984 F.2d 1467, 1472 n.2 (7th Cir. 1993) we noted that the Civil Rights Act of 1991 had "overruled" *Patterson*, but nonetheless applied the holding of *Patterson* because the Civil Rights Act of 1991 did not have retroactive reach. We also noted, however, that, as a result, "this case represents one of the few in which we still apply the *Patterson* standards." *Id.*

retaliation for complaining about the discrimination of others.[6] We held that section 1981 did not protect against retaliation in such circumstances. *Hart*, 426 F.3d at 866. But *Hart* has no application to the facts here, where the plaintiff is plainly asserting retaliation stemming from discriminatory acts targeting him. (And, as we shall see below, even *Hart*'s limited holding is no longer good law in light of the Supreme Court's *Jackson* decision.)

Thus, the issue before us is whether section 1981, as amended by the Civil Rights Act of 1991, applies to claims of retaliation. We hold that it does. The plain text of the statute, as amended in 1991, makes clear that section 1981 encompasses the "termination of contracts," and there can be no doubt that a retaliatory discharge is indeed a termination of the employment contract.[7] Indeed, the Supreme Court subsequently interpreted the amended provisions of section 1981 as protecting against "discriminatory contract terminations." *Rivers*, 511 U.S. at 302 (stating that "Section 101 of that Act provides that § 1981's prohibition against racial discrimination in the making and enforcement of contracts applies to all phases and incidents of the contractual relationship, including discriminatory contract terminations"). Now, it may be that, strictly speaking, a discriminatory "termination of contract" is not the same thing as a retaliatory

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[6] Our decision in *Hart* was initially issued as an unpublished order, but, upon motion to publish it filed by a member of the bar, the order was converted to a published opinion.

[7] The at-will nature (i.e., no formal written contract and no specific terms of employment) of the plaintiff's employment here does not preclude the plaintiff from relying on section 1981's provisions pertaining to contracts. *See Walker*, 340 F.3d at 475-77 (holding that at-will employees can state claims under section 1981).

discharge -- for instance, analytically, retaliation need not have a discriminatory intent behind it. *See Malhotra*, 885 F.2d at 1312; *Jackson*, 544 U.S. at 185-87 (Thomas, J., dissenting). But the Civil Rights Act of 1991 dispensed with this heightened degree of formalism, and the legislative history confirms that Congress intended retaliation to be included within section 1981. *See Andrews*, 140 F.3d at 1411 n.12. As a result, whatever concerns *Patterson* raised about the postformation nature of retaliatory discharges evaporated with the passage of the Civil Rights Act of 1991. *See id.*; *Rivers*, 511 U.S. at 306 n.6. *But see Rivers*, 511 U.S. at 309 n.8 (noting that the "legislative history of the 1991 Act reveals conflicting views about whether § 101 would 'restore' or instead 'enlarge' the original scope of § 1981") and *id.* at 305 ("A legislative response does not necessarily indicate that Congress viewed the judicial decision as 'wrongly decided' as an interpretive matter. Congress may view the judicial decision as an entirely correct reading of prior law -- or it may be altogether indifferent to the decision's technical merits -- but may nevertheless decide that the old law should be amended, but only for the future.").

2. Our Holding Is Consistent with *Jackson v. Birmingham Board of Education*, which Affirmed *Sullivan* 's Continuing Validity

Even if the statute were unclear on this issue -- after all, the specific word "retaliation" still does not appear in section 1981[8] -- and without turning to the pertinent legislative

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[8] *Cf.* 42 U.S.C. § 2000e-3(a) (Title VII) (providing that it is an "unlawful employment practice" for an employer to retaliate against an employee because he has "opposed any practice made an unlawful employment practice by [Title VII], or because he has

history, the Supreme Court's recent decision in *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005) compels the same result. In *Jackson*, the male coach of a girls' high school basketball team sued the Birmingham Board of Education under Title IX of the Education Amendments of 1972, claiming that the Board retaliated against him for complaining about sex discrimination in the high school's athletic program. *Id.* at 171. Title IX prohibits sex discrimination by recipients of federal education funding, but, like section 1981, it contains no express mention of "retaliation." *Id.* at 173. Instead, Title IX simply prohibits "discrimination." The Supreme Court, however, determined that Title IX's proscription on discrimination necessarily subsumed (and implied) acts of retaliation, which it viewed as simply different forms of discrimination:

> Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. Retaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to differential treatment. Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional

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made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing.").

> "discrimination" "on the basis of sex," in violation of Title IX.

Id. at 173-74 (citations omitted) (emphasis in original).

The *Jackson* court relied heavily on its prior decision in *Sullivan*, 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386, where it held that section 1981's companion statute, section 1982, which prohibits discrimination with respect to property rights, contained an implied prohibition against retaliation. *Jackson*, 544 U.S. at 176. Specifically, the *Jackson* court interpreted *Sullivan* as holding that section 1982's general prohibition on racial discrimination, which, like section 1981, makes no mention of retaliation, nonetheless covered "retaliation against those who advocate the rights of groups protected by that prohibition." *Id.* The *Jackson* court also observed that the statutory objective of preventing discrimination would be severely hampered if retaliatory practices were not also banned: "If recipients were permitted to retaliate freely, individuals who witness discrimination would be loathe to report it, and all manner of Title IX violations might go unremedied as a result." *Id.* at 180 (citing *Sullivan*, 396 U.S. at 237). "Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel." *Id.*

Thus, the Jackson court appears to have jettisoned our prior observation that "retaliation and discrimination are separate wrongs." *Cf. Malhotra*, 885 F.2d at 1312; *see Jackson*, 544 U.S. at 185-87 (Thomas, J., dissenting)(noting that "[a] claim of retaliation is not a claim of discrimination on the basis of sex" and that "[r]etaliation therefore cannot be said to be discrimination on the basis of anyone's sex, because a retaliation claim may succeed where no sex discrimination ever took place"). Instead, at least for the purpose of

interpreting broad statutory discrimination prohibitions that omit specific retaliation provisions, the Supreme Court has determined that retaliation is simply a different form of discrimination, and one that is included within broad-based prohibitions of discrimination. *See Jackson*, 544 U.S. at 175 (distinguishing between the structure of Title VII, which includes express retaliation provisions, and Title IX's "implied" cause of action). Moreover, the *Jackson* court noted that a statute targeting discrimination would necessarily be undercut if retaliatory acts evaded its purview. *Id.* at 180. And although *Jackson* directly targeted Title IX, there is no meaningful analytic distinction that renders the conclusion in *Jackson* inapplicable to section 1981.[9] That is, like Title IX, section 1981 broadly prohibits discrimination (although only Title IX, enacted roughly a century after section 1981, contains the more contemporary term of "discrimination"),

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[9] Our colleague in dissent argues that the analysis in *Jackson* was particularized to Title IX and thus not applicable to our discussion of section 1981. We disagree. In *Jackson*, the Supreme Court relied in large part upon *Sullivan*, a case concerning section 1982. *See, e.g.*, *Jackson*, 544 U.S. at 176 ("Congress enacted Title IX just three years after *Sullivan* was decided, and accordingly that decision provides valuable context for understanding the statute."); *id.* at 177 ("Retaliation for Jackson's advocacy of the rights of the girls' basketball team in this case is discrimination on the basis of sex, just as retaliation for advocacy on behalf of a black lessee in *Sullivan* was discrimination on the basis of race."). Therefore, *Jackson*'s reasoning did not depend upon features unique to Title IX, and *Jackson* has implications for cases involving section 1982 and its companion statute -- section 1981. Moreover, the *Jackson* Court's reliance upon *Sullivan* affirms *Sullivan*'s continuing validity. Irrespective of our impression of *Sullivan*'s interpretive method, then, we are bound by its holding. That holding, in part, leads us to conclude (as has every circuit to address the question) that a retaliation claim is cognizable under section 1981.

fails to list specific discriminatory practices, and omits specific references to retaliation. *See id.* at 175-76.

Indeed, the fact that Title IX omitted any mention of retaliation, even though it was enacted in 1972, eight years after Title VII and its specific inclusion of retaliation provisions, did not trouble the *Jackson* court nor lead it to conclude that Congress must have intended to exclude retaliation from Title IX's coverage. *See id.* To the contrary, the Court looked to its *Sullivan* decision (which was issued three years before the passage of Title IX) and concluded that it provided "a valuable context for understanding" Title IX. *Id.* at 176. Specifically, the Court stated "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [*Sullivan*] and that it expected its enactment [of Title IX] to be interpreted in conformity with [it]." *Id.* (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 699, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979)).

Thus, the foundation of the *Jackson* decision is built squarely upon the Court's prior determination in *Sullivan* that section 1 of the Civil Rights Act of 1866 was intended as a broad prohibition on discrimination that contained an implied cause of action for retaliation. *Id.*; *see Sullivan*, 396 U.S. at 237 ("A narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866, 14 Stat. 27, from which § 1982 was derived."). And there can be no doubt that *Sullivan*'s examination of section 1982 with respect to implied prohibitions on retaliation readily applies to its companion statute, section 1981, given that sections 1981 and 1982 are simply carve-outs of the same section of the Civil Rights Act of 1866, sharing identical historical origins and concerns. *See, e.g.*, *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 384,

102 S. Ct. 3141, 73 L. Ed. 2d 835 (1982) (noting the shared legislative history between section 1981 and its "companion" section 1982); *Runyon*, 427 U.S. at 170-71 (noting that the holding in *Jones*, 392 U.S. at 437 pertaining to section 1982 necessarily implicated section 1981, given their shared legislative history); *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 440, 93 S. Ct. 1090, 35 L. Ed. 2d 403 (1973) (holding that "[i]n light of the historical interrelationship" between sections 1981 and 1982, there was no reason to construe the sections differently solely on the basis that the defendant was a private party); *see also Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1270 (6th Cir. 1977) (holding that "in view of both Sections 1981 and 1982 being derived from the Civil Rights Act of 1866 and in view of the similarity in language and intent, no reason is seen not to apply the rationale of *Sullivan* in interpreting Section 1981"); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 312 n.9 (2d Cir. 1975) (same).

3. Our Holding Is Sensible and Aligned with the Weight of Authority

Accordingly, we join the other circuits that have addressed this issue in the post-Civil Rights Act of 1991 era -- all of whom uniformly conclude that retaliation claims are cognizable under section 1981. *See Foley*, 355 F.3d at 339; *Hawkins*, 163 F.3d at 693; *Andrews*, 140 F.3d at 1410-11; *Barge*, 87 F.3d at 259. Not only is this result compelled by the Civil Rights Act of 1991 and corresponding Supreme Court authority, but it is also the sensible result. To hold that section 1981 allows unfettered retaliation is to invite wholesale circumvention (and eventual undermining) of the statute, and it would create perverse incentives for the employer to fire complainants as quickly as possible to thereby limit (or entirely avoid) damages under section 1981.

See, e.g., *Goff*, 678 F.2d at 598 (noting that "Section 1981 would become meaningless if an employer could fire an employee for attempting to enforce his rights under that statute"). This is not an insignificant issue, as section 1981 damages often have more teeth than those available under Title VII.

There is no traction in observing that Title VII provides a back-up or competing statutory regime to the plaintiff. *See generally Randolph v. IMBS, Inc.*, 368 F.3d 726, 732 (7th Cir. 2004) (noting the significant overlap and differences in the two statutory schemes). Although the substantive overlap and procedural inconsistencies between section 1981 and Title VII animated the Court's concerns in *Patterson*, Congress is not bothered by this parallel statutory scheme. *See Johnson*, 421 U.S. at 459 ("'[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.' In particular, Congress noted 'that the remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive.'" (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 at 48, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974) and H.R. Rep. No. 92-238, at 19 (1971)); *see also Patterson*, 491 U.S. at 201-12 (Brennan, J., concurring and dissenting in part) (citing and discussing legislative history indicating that Congress intended to maintain section 1981 and Title VII as "separate, distinct, and independent"); *Randolph*, 368 F.3d at 732. Nor is it our role to attempt to harmonize these statutes or seek to channel particular causes of action toward one or the other statute. Congress has unmistakably provided for two separate regimes to redress, in many instances, identical discriminatory practices in the

employment context. The resolution of any inefficiencies resulting from the existence of two parallel (but quite different) statutory regimes that cover similar harms, but contain differing procedural requirements, limitations periods, and remedies, resides with Congress, not us.

4. We Overturn *Hart* to the Extent that it Conflicts with *Sullivan* and *Jackson*

We must now briefly return to *Hart*, where we held that a white employee who alleged that he suffered retaliation for supporting his co-worker's charge of discrimination could not maintain such a claim because section 1981 "encompasses only racial discrimination on account of the plaintiff 's race and does not include a prohibition against retaliation for opposing racial discrimination." *Hart*, 426 F.3d at 866. In so holding, we relied solely on the Eleventh Circuit's decision in *Little v. United Technologies, Carrier Transicold Division*, 103 F.3d 956 (11th Cir. 1997), which held that a white employee who opposed a co-worker's racially derogatory remark could not bring a section 1981 retaliation claim because he did not contend that the employer "discriminated against him because he was white" (i.e., did not claim direct discrimination). *Id.* at 961. The *Little* decision, however, cited no authority for this proposition, nor did it provide reasoning for this declaration.[10] *Id.* We likely placed too much reliance on *Little*, given that its holding runs squarely against

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[10] In addition, the Eleventh Circuit subsequently hinted that *Little* may conflict with its decision in *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997), which held that a class of employees could proceed on a section 1981 retaliation claim based on allegations that they were fired for refusing to participate in an employer's discrimination against non-white customers. *See Andrews*, 140 F.3d at 1412 n.14.

the Supreme Court's *Sullivan* decision, as well as the Court's subsequent decision in *Jackson*, which further solidified *Sullivan*'s holding. *See Sullivan*, 396 U.S. at 237; *Jackson*, 544 U.S. at 173-74; *see also Warth v. Seldin*, 422 U.S. 490, 514 n.22, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) (citing *Sullivan* for the proposition that sections 1981 and 1982 are examples of "exceptions" that allow parties "to raise putative rights of third parties," including such situations where a party is "punished" for entering into a contractual relationship with an individual protected under the statute). *Jackson*, which was issued after *Little*, but while the *Hart* appeal was pending, made clear that *Sullivan* prohibits "retaliation against those who advocate the rights of groups protected" by section 1 of the Civil Rights Act of 1866. *Jackson*, 544 U.S. at 176. Thus, *Sullivan* stands for the proposition that a "white owner could maintain his *own* private cause of action under § 1982 if he could show that he was 'punished for trying to vindicate the rights of minorities.'" *Id.* at 176 n.1. Aside from conflicting with *Sullivan* and *Jackson*, the *Little* decision is plainly the minority view among the circuits: the great weight of authority is that individuals who suffer retaliation for opposing the racial discrimination suffered by others have standing to assert retaliation claims under section 1981.[11]

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[11] *See, e.g., Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9, 14 (1st Cir. 1979) (holding that corporation had standing to bring section 1981 claim and that "to invoke § 1981 or § 1982 one need not be a member of the racial class protected by the statute and one need not even be able to identify any specific member of the class who suffered or may suffer discrimination"); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 312 (2d Cir. 1975) (white plaintiff could bring section 1981 claim based upon allegation that his employer "'forced' him into retirement solely because he had sold his house to a black person"); *Liotta v. Nat'l Forge Co.*, 629 F.2d 903, 906-07 (3d Cir. 1980) (summary judgment inappropriate where material

As a result, it is clear that our decision in *Hart* cannot survive scrutiny under *Sullivan*, as expanded by the Court in *Jackson*. Moreover, our decision is out-of-step with the outcomes reached in the vast majority of cases outside of our circuit. Accordingly, we overrule our holding in *Hart* on this

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issues of fact remained regarding section 1981 claim brought by plaintiff who claimed he was discharged for supporting rights of African-American co-workers); *Fiedler v. Marumsco Christian Sch.*, 631 F.2d 1144, 1149 (4th Cir. 1980) (white student protected under section 1981 from retaliation by school because of her association with a black schoolmate); *Pinkard v. Pullman-Standard, a Div. of Pullman, Inc.*, 678 F.2d 1211, 1229 (5th Cir. Unit B 1982) (retaliatory discharge claim allowed under section 1981 where evidence showed plaintiff was discharged for lawful advocacy of minority and union rights); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 575 (6th Cir. 2000) (holding that it was clear under "well-settled" law that a plaintiff "need not have alleged discrimination based upon his race as an African American in order to satisfy the protected status requirement of his claims[,]" but rather plaintiff's advocacy on behalf of minorities was sufficient to allege retaliation under section 1981); *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1270 (6th Cir. 1977) (white plaintiff had standing under section 1981 for claim that employer fired him because he objected to discriminatory discharge of an African-American co-worker); *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1446-47 (10th Cir. 1988) (white employee fired for helping African-American co-worker file an EEOC claim could state a claim under section 1981); *see also Malhotra*, 885 F.2d at 1316 (Cudahy, J., concurring) (noting that "a white person who is discharged for espousing the rights of minorities could establish that the employer acted with discriminatory intent (as required to state a claim under section 1981); that the racial discrimination was directed at another, rather than directly at the plaintiff, is irrelevant, since it is the plaintiff who is suffering due to the employer's racial discrimination" and citing *Sullivan* and cases from other circuits in support).

limited issue.[12] We now hold that a plaintiff may maintain a cause of action under section 1981, where the plaintiff has suffered retaliation for advocating the rights of those protected under section 1981. *See Jackson*, 544 U.S. at 179-80.

C. Humphries Presented a Claim of Retaliation Sufficient to Survive Summary Judgment

Turning to the merits of Humphries's retaliation claim under section 1981, we generally have applied the same prima facie requirements to discrimination claims brought under Title VII and section 1981. *See, e.g., Alexander v. Wis. Dep't of Health & Family Servs.*, 263 F.3d 673, 682 (7th Cir. 2001) (applying same standard to Title VII and section 1981 discrimination claims); *Johnson v. City of Fort Wayne, Ind.*, 91 F.3d 922, 940 (7th Cir. 1996) ("Although section 1981 and Title VII differ in the types of discrimination they proscribe, the methods of proof and elements of the case are essentially identical."); *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 568 (7th Cir. 1989) ("It is well settled that the methods and order of proof applicable to a claim of disparate treatment under Title VII are equally availing under § 1981."); *see also Patterson*, 491 U.S. at 186 (applying *McDonnell Douglas* framework to section 1981 claims). We see no reason to apply different requirements between the statutes with regard to retaliation claims. *See Foley*, 355 F.3d at 340 n.8 (approving of the same standard applied to retaliation claims under Title VII and

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[12] Because this opinion overrules a prior case, it has been circulated in advance of publication to all judges of this court in regular active service pursuant to Seventh Circuit Rule 40(e). A majority did not favor a rehearing en banc on the question of overruling *Hart*, 426 F.3d 863.

section 1981); *see also Hasan v. DOL*, 400 F.3d 1001, 1003-04 (7th Cir. 2005) (applying Title VII prima facie requirements to retaliation cases brought under the Energy Reorganization Act); *Larimer v. I.B.M. Corp.*, 370 F.3d 698, 702 (7th Cir. 2004) (applying Title VII prima facie requirements to retaliation claim under ERISA).

To overcome Cracker Barrel's motion for summary judgment, Humphries may proceed under either the direct or indirect methods. *See Sitar v. Ind. Dep't of Transp.*, 344 F.3d 720, 728 (7th Cir. 2003) (citing *Stone v. City of Indianapolis Pub. Utils. Div.*, 281 F.3d 640 (7th Cir. 2002)). Under the direct method, Humphries must present direct evidence of (1) a statutorily protected activity; (2) a materially adverse action taken by the employer; and (3) a causal connection between the two. *Id.*; *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415, 165 L. Ed. 2d 345 (2006). Under the indirect method, he must show that after opposing the employer's discriminatory practice only he, and not any similarly situated employee who did not complain of discrimination, was subjected to a materially adverse action even though he was performing his job in a satisfactory manner. *See Sylvester v. SOS Children's Villages Ill., Inc.*, 453 F.3d 900, 902 (7th Cir. 2006); *White*, 126 S. Ct. at 2415. Thus, the indirect "method of establishing a prima facie case requires proof both of similarly situated employees and of the plaintiff's performing his job satisfactorily." *Sylvester*, 453 F.3d at 902.

Under the district court's view (which, naturally, Cracker Barrel echoes on appeal), Humphries's prima facie case failed because, among other reasons, he did not present sufficient evidence to meet the similarly situated requirement under the

indirect method.[13] According to Cracker Barrel, similarly situated comparators *must* have the same supervisors, the same job duties, the same work performance histories, and must have engaged in the same bad conduct as the plaintiff. In other words, they must be essentially identical to the plaintiff, and, under Cracker Barrel's view, Humphries's two comparators, Stinnett and Dowd, fail that test.

Cracker Barrel's view of our similarly situated requirement is too rigid and inflexible. This requirement "should not be applied mechanically or inflexibly." *Hull v. Stoughton Trailers, LLC*, 445 F.3d 949, 952 (7th Cir. 2006). True, we have sometimes stated the similarly situated requirement in the "must" terms that Cracker Barrel argues, but a more sensitive reading of our cases indicates that we have often stated that the similarly situated requirement "*normally* entails a showing that the two employees dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." *Radue v. Kimberly-Clark Corp.* 219 F.3d 612, 617-18 (7th Cir. 2000) (emphasis added); *see also Keri v. Bd. of Trs. of Purdue Univ.*, 458 F.3d 620, 644 (7th Cir. 2006); *Ezell v. Potter*, 400 F.3d 1041, 1049-50 (7th Cir. 2005); *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1002 (7th Cir. 2004); *Lucas v. Chi. Transit Auth.*, 367 F.3d 714, 733 (7th Cir. 2004); *Appelbaum v. Milwaukee Metro. Sewerage Dist.*, 340 F.3d 573, 580 (7th Cir. 2003); *Peters v. Renaissance Hotel Operating Co.*, 307 F.3d 535, 546 (7th Cir. 2002); *Snipes v. Ill. Dep't of Corr.*,

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[13] We need not decide whether Humphries has enough evidence under the direct method because he meets the requirements of the indirect method.

291 F.3d 460, 463 (7th Cir. 2002); *Peele v. Country Mut. Ins. Co.*, 288 F.3d 319, 330 (7th Cir. 2002). In other words, we have emphasized that the similarly situated inquiry is a flexible one that considers "all relevant factors, the number of which depends on the context of the case." *Radue*, 219 F.3d at 617. "As to the relevant factors, an employee need not show complete identity in comparing himself to the better treated employee, but he must show substantial similarity." *Id.* at 618; *see also Goodwin v. Bd. of Trs. of Univ. of Ill.*, 442 F.3d 611, 619 (7th Cir. 2006); *Ezell*, 400 F.3d at 1050.

In addition, our case law does not provide any "magic formula for determining whether someone is similarly situated." *Chavez v. Ill. State Police*, 251 F.3d 612, 636 (7th Cir. 2001) (discussing the similarly situated requirement in the equal protection context). Instead, courts should apply a "common-sense" factual inquiry -- essentially, are there enough common features between the individuals to allow a meaningful comparison? *Id.* (citing *Freeman v. Madison Metro. Sch. Dist.*, 231 F.3d 374, 382-83 (7th Cir. 2000) and *Radue*, 219 F.3d at 619). Put a different way, the purpose of the similarly situated requirement is to eliminate confounding variables, such as differing roles, performance histories, or decision-making personnel, which helps isolate the critical independent variable: complaints about discrimination. *See Hull*, 445 F.3d at 951-52.

It is important not to lose sight of the common-sense aspect of this inquiry. It is not an unyielding, inflexible requirement that requires near one-to-one mapping between employees -- distinctions can always be found in particular job duties or performance histories or the nature of the alleged transgressions. *See, e.g., Ezell*, 400 F.3d at 1050. Now, it may be that the degree of similarity necessary may vary in accordance with the size of the potential comparator pool, as

well as to the extent to which the plaintiff cherry-picks would-be comparators, *see Crawford v. Ind. Harbor Belt R.R. Co.*, 461 F.3d 844, 845-46 (7th Cir. 2006), but the fundamental issue remains whether such distinctions are so significant that they render the comparison effectively useless. In other words, the inquiry simply asks whether there are sufficient commonalities on the key variables between the plaintiff and the would-be comparator to allow the type of comparison that, taken together with the other prima facie evidence, would allow a jury to reach an inference of discrimination or retaliation -- recall that the plaintiff need not *prove* anything at this stage.

Establishing a prima facie case should not be such an onerous requirement: "the plaintiff 's evidence on the prima facie case need not be overwhelming or even destined to prevail; rather, the plaintiff need present only 'some evidence from which one can infer that the employer took adverse action against the plaintiff on the basis of a statutorily proscribed criterion.'" *Bellaver v. Quanex Corp.*, 200 F.3d 485, 493 (7th Cir. 2000) (quoting *Leffel v. Valley Fin. Servs.*, 113 F.3d 787, 793 (7th Cir. 1997) (also noting that the prima facie burdens "should not be applied rigidly")); *see also Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) ("The burden of establishing a prima facie case of disparate treatment is not onerous."). "The prima facie case, and specifically its fourth prong, are meant to identify situations where the 'actions taken by the employer, . . . if unexplained, are more likely than not based on consideration of impermissible factors.'" *Collier v. Budd Co.*, 66 F.3d 886, 890 (7th Cir. 1995) (quoting *Allen v. Diebold, Inc.*, 33 F.3d 674, 675 (6th Cir. 1994)). But the method of inquiry established by *McDonnell Douglas* was "never intended to be rigid, mechanized, or ritualistic." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567,

577, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978). After all, our intention in establishing the similarly situated requirement was to provide plaintiffs the "boost" that the *McDonnell Douglas* framework intended. *See Stone*, 281 F.3d at 643.

With this legal and policy backdrop in mind, we now turn to the would-be comparators in this case. It is clear that Stinnett was a sufficient comparator. He held the same associate manager position as Humphries, with the same duties, including responsibility for ensuring the safe was locked at all times. He shared the same supervisor (Dowd) and same ultimate decisionmaker (Christensen). Like Humphries, Stinnett had received past negative performance evaluations, including low ratings on "asset protection" categories. In addition, Humphries presented competent testimony (both his own and that of a co-worker) that Stinnett – like Humphries – had used a so-called Gold Card to pay for a meal that a customer had complained about, apparently in contravention of Cracker Barrel policy. In addition, Humphries presented evidence that Stinnett's termination of Green (the immediate precursor event connected to Humphries's termination) was impermissible (under Cracker Barrel policy, only general managers, not associate managers, can fire employees). If anything, the record tends to suggest that Humphries generally performed slightly better than Stinnett. In addition, Humphries presented evidence that Stinnett also left the safe unlocked. Specifically, Humphries testified that Stinnett (and Dowd) routinely left the safe unlocked -- the very basis for which Humphries was fired, and one which Humphries hotly disputes.

Cracker Barrel seeks to distinguish Stinnett on the grounds that he left the safe unlocked during the *daytime* (i.e., business hours) whereas Humphries left it unlocked during the *nighttime* (i.e., overnight). This is a distinction without much

difference. Although arguments can be made as to relative greater potential harm of leaving the safe unlocked at night, the issue remains that it was contrary to Cracker Barrel policy to leave the safe unlocked and unattended at any point during the 24-hour day. More importantly, Cracker Barrel's argument here reflects precisely the type of formalistic argument that should not carry the day at summary judgment. Humphries was not required to show an identity of wrongful conduct: "the law is not this narrow." *Ezell*, 400 F.3d at 1050. It was enough to show "similar -- not identical -- conduct" and this surely qualifies under that standard. *Id.* To find otherwise is to lose sight of the big-picture, common-sense perspective. Thus, in terms of job titles, work duties, supervisor, and work performance histories, Stinnett and Humphries have more than sufficient similarity. A single comparator will do; numerosity is not required.[14] *See, e.g.*, *Goodwin*, 442 F.3d at 619; *Ezell*, 400 F.3d at 1050.

Cracker Barrel also contends that it established that it had a legitimate reason for firing Humphries, and that Humphries failed to show that the reason that Cracker Barrel provided for his discharge was pretext (i.e., a lie). *See Forrester v. Rauland-Borg Corp.*, 453 F.3d 416, 417-19 (7th Cir. 2006) (discussing general requirements to establish pretext). On these issues, we agree with the district court's determination that the record is replete with contested material facts pertaining to Humphries's work performance and the nature of Christensen's beliefs when he terminated Humphries. As an initial matter, Humphries contends that he did not leave the safe unattended, and the evidence implicating him is comprised solely of the testimony from Stinnett – the very

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[14] Because we conclude the Stinnett was an adequate comparator, we need not address whether Dowd fits the requisite criteria.

individual Humphries targeted in his final complaint of discrimination. And there is testimony in the record that a co-worker observed Stinnett and Dowd acting differently (less deferentially) toward Humphries just prior to his firing, and that this co-worker specifically warned Humphries about Stinnett and Dowd because she believed that their behavior indicated that they were "up to something to harm Humphries." In addition, prior to firing Humphries, it appears that Christensen conducted no investigation into the veracity of Stinnett's claim. He did not interview Humphries; he simply credited Stinnett's story. Finally, the timing of Humphries's firing is suspicious: he was fired one week after he complained to Christensen about discriminatory practices and one day prior to a scheduled meeting with Dowd, which, presumably would have created a more elaborate (and less favorable to Cracker Barrel) documentary record of Humphries's complaints. Finally, there was evidence in the record tending to show that similar transgressions were not sufficient to fire other similarly situated employees who did not complain of discrimination. *See generally Curry v. Menard, Inc.*, 270 F.3d 473, 479 (7th Cir. 2001) (holding that a showing that similarly situated employees were treated differently may be enough to establish pretext).

This is not to say that merely pointing to an employer's shoddy investigatory efforts is sufficient to establish pretext. Erroneous (but believed) reasons for terminating an employee are not tantamount to pretextual reasons. *See Forrester*, 453 F.3d at 419; *Little v. Ill. Dep't of Revenue*, 369 F.3d 1007, 1012-13 (7th Cir. 2004). But, under the circumstances here, there was sufficient other circumstantial evidence in the record to support a reasonable inference that Humphries was "set-up" by Stinnett (in tandem with Dowd and Christensen), *see Sylvester*, 453 F.3d at 905, and that his purported bad act of leaving the safe unlocked was a fabrication to justify his

firing. In this sense, the quality of Christensen's investigation may have some bearing on the truthfulness of Cracker Barrel's proferred reasons for terminating Humphries. In short, these are the sort of disputed factual issues that a jury should sort out.

As a final note, on remand, Humphries will have only his claim of retaliation. We agree with the district court's determination that he waived (forfeited would be the better term) his discrimination claim by devoting only a skeletal argument in response to Cracker Barrel's motion for summary judgment. Although Humphries did attempt to incorporate his well-developed arguments pertaining to the retaliation claim, and there is substantial over-lap with regard to the prima facie requirements between the two claims, he did nothing more. On appeal, however, Humphries addresses for the first time the issue of his replacement, and Cracker Barrel outlines a series of arguments as to why Humphries's reprimands and warnings do not constitute materially adverse employment actions. None of these arguments were reached by the district court nor flushed out in the briefing -- this is precisely why we insist on parties raising all pertinent arguments below. Given that Humphries's core claim is one for retaliation, there is little inequity in applying our typical forfeiture rule to this particular claim.

III. CONCLUSION

For the foregoing reasons, we **REVERSE** the district court's grant of summary judgment in favor of the defendant on Humphries's retaliation claim, we **AFFIRM** the grant of summary judgment in favor of the defendant on Humphries's discrimination claim, and we **REMAND** for further proceedings in accordance with this opinion.

DISSENT: EASTERBROOK, *Chief Judge*, dissenting in part. The Supreme Court held in *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005), that Title IX of the Education Amendments of 1972 -- which forbids educational programs that receive federal funds from discriminating on account of sex, 20 U.S.C. § 1681(a) -- allows the judiciary to define the word "discriminate." The Court used that authority to curtail steps that make reports of discrimination costly to students and employees. Today this court attributes to *Jackson* the conclusion that *all* federal statutes dealing with the employment relation prohibit retaliation.

The Justices gave three principal reasons for their decision in *Jackson*. (1) The word "discrimination" has sufficient ambiguity to permit a reading that includes an anti-retaliation norm. 544 U.S. at 173-74. (2) Title IX was enacted in 1972, after anti-retaliation norms became common, making it sensible to resolve the ambiguity in favor of this reading. 544 U.S. at 176. (3) Lack of an anti-retaliation norm would make it too easy for educational programs to undermine the principal substantive rules in Title IX by getting rid of anyone who tried to enforce them. 544 U.S. at 180-81.

None of these reasons applies to 42 U.S.C. § 1981, the subject of today's decision. (1) The word "discriminate" does not appear in § 1981. What that statute provides is that all citizens have the same right to make and enforce contracts. How can a decision that resolves ambiguity in the word "discriminate" apply to other statutes with different language? (2) Section 1981 was enacted in 1866, long before anti-retaliation norms were created. The first mention of "retaliatory discharge" in any federal appellate opinion came in *NLRB v. Arthur Winer, Inc.*, 194 F.2d 370 (7th Cir. 1952), and the first use by the Supreme Court was *NLRB v.*

Scrivener, 405 U.S. 117, 92 S. Ct. 798, 31 L. Ed. 2d 79 (1972). (3) Lack of an anti-retaliation norm in § 1981 would not hinder enforcement of civil rights laws, because there is a *real* anti-retaliation rule in Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000e-3(a). That's one reason why *Jackson* distinguished Title IX of the 1972 Act from Title VII of the 1964 Act. 544 U.S. at 175. *Cf. Garcetti v. Ceballos*, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006) (holding that there is no general anti-retaliation doctrine under 42 U.S.C. § 1983).

The question at issue today is not whether an employer may fire a worker who protested discrimination, but whether an employee may present a claim of retaliation even though he failed to file a timely charge under Title VII and engage in conciliation before turning to court. By adding an anti-retaliation rule to § 1981, the majority does not craft an ancillary doctrine necessary to make the principal norm work (as the Court did in *Jackson*); instead it demolishes components of Title VII that Congress thought necessary to expedite the resolution of disputes and resolve many of them out of court.

This is not the first time that a disgruntled employee has turned to § 1981 after missing the deadline for litigation under Title VII. The Court held in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989), that § 1981 should be construed when possible to avoid conflict with Title VII. Today, however, the majority does exactly what *Patterson* forbids. It reads § 1981 to have the same substantive content as Title VII, but without features such as short periods of limitations that employees find inconvenient. That's not a sound way to treat this statute, already extended far beyond its original meaning. *See Runyon v. McCrary*, 427 U.S. 160, 96 S. Ct. 2586, 49 L. Ed. 2d 415

(1976); Charles Fairman, VI *History of the Supreme Court of the United States: Reconstruction and Reunion 1864-88 (Part One)* 1207-60 (1971); Gerhard Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 Sup. Ct. Rev. 89. *Patterson* holds that the process of judicial extension must stop.

Congress can add to a law's reach, and in 1991 it did so -- but the 1991 revision does not mention "retaliation" or change the text of § 1981(a), on which Humphries's claim rests. When § 1981 and Title VII have different but overlapping provisions (as they do, for example, with respect to damages), then the judiciary must enforce both. *See, e.g.*, *Branch v. Smith*, 538 U.S. 254, 273, 123 S. Ct. 1429, 155 L. Ed. 2d 407 (2003); *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124, 141-44, 122 S. Ct. 593, 151 L. Ed. 2d 508 (2001); *Randolph v. IMBS, Inc.*, 368 F.3d 726 (7th Cir. 2004). But the fact that overlapping systems may coexist does not justify *creating* incompatibility, as the majority does today. Section 1981 does not contain an anti-retaliation rule. When deciding whether to add such a rule to § 1981, we must consider the effect that this step would have on Title VII. That's the holding of *Patterson*.

To the extent that my colleagues treat the 1991 legislation as discarding *all* of *Patterson*, they follow an approach that was rejected in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994), and *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). Legislation does not "overrule" decisions of the Supreme Court; new statutes adopt new rules but leave in place existing norms that the legislation does not touch. Nothing in the Civil Rights Act of 1991 justifies reading § 1981 more broadly than its (amended) text or undermining parts of Title VII that remain in force.

The Court demonstrated this in *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 126 S. Ct. 1246, 163 L. Ed. 2d 1069 (2006), which unanimously reversed a decision that had invoked the judges' views of wise public policy to extend § 1981. *Domino's Pizza* shows that *Patterson* cannot be treated as defunct. The Supreme Court has cited *Patterson* favorably in 24 decisions since *Landgraf* and *Rivers*. Of these, *Domino's Pizza* is the most salient because it uses *Patterson*'s interpretive methodology to construe § 1981 as amended by the Civil Rights Act of 1991.

My colleagues end up declaring that the text of § 1981, its context, its history (the absence of anything like an anti-retaliation norm in 1866), its function, and the effect of an inventive reading on the operation of Title VII all are irrelevant. The rule they impute to *Jackson* has no moorings in any statute's text or provenance. Yet that's not at all what *Jackson* says; it dealt with the actual language and operation of Title IX and does not justify a language-and-history-free interpretation of all federal statutes. I do not think it likely that the Supreme Court, which insists that statutory language be followed even if inconvenient or jarring -- *see, e.g.*, *Arlington Central School District v. Murphy*, 126 S. Ct. 2455, 2463, 165 L. Ed. 2d 526 (2006); *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 125 S. Ct. 2611, 2625-27, 162 L. Ed. 2d 502 (2005); *Dodd v. United States*, 545 U.S. 353, 125 S. Ct. 2478, 162 L. Ed. 2d 343 (2005); *Tyler v. Cain*, 533 U.S. 656, 663 n.5, 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001) -- would accept such an atextual approach. I appreciate the temptation to make every law "the best it can be," but that is not the Supreme Court's current mode of statutory interpretation, as *Domino's Pizza* shows for § 1981 in particular.

Perhaps it *was* the approach that prevailed in 1969, when the Court decided *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969). The majority in *Sullivan* held that a plaintiff in litigation under 42 U.S.C. § 1982 has standing to complain about retaliation, and *Jackson* concluded that it must have had a substantive component too. So read, *Sullivan* is of a piece with other decisions holding that judges may supplement statutes to make them "more effective." *See, e.g., J.I. Case Co. v. Borak*, 377 U.S. 426, 84 S. Ct. 1555, 12 L. Ed. 2d 423 (1964). But *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975), abandoned that approach, and since the 1970s the Court has lashed interpretation more closely to statutory text. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice -- and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26, 107 S. Ct. 1391, 94 L. Ed. 2d 533 (1987) (emphasis in original).

It is anachronistic to say that, because *Sullivan* engaged in a freewheeling "interpretation" of § 1982, we may today take liberties with § 1981. One might as well cite *Borak* for the proposition that "every right implies a remedy" so that courts should today create a private right of action for every statute other than those that the Supreme Court addressed in *Cort* and its successors.

Yet that is the majority's tack. The argument goes that, because *Sullivan* ignored the language of § 1982 and drafted an "improved" version of the statute, we are free to do the same today for § 1981, its neighbor. The Supreme Court requires us to proceed otherwise. *Borak* dealt with § 14(a) of

the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a). It was as freewheeling in "interpreting" that law as *Sullivan* was with § 1982. Yet the Court has held that the change of interpretive method announced in *Cort* applies to all other sections of the Securities Exchange Act. *See Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 97 S. Ct. 926, 51 L. Ed. 2d 124 (1977) (§ 14(e)); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979) (§ 17(a)). *Borak* and similar decisions from the 1960s have not been overruled, but we have been told in no uncertain terms that they must not be extended. Indeed, in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 111 S. Ct. 2749, 115 L. Ed. 2d 929 (1991), the Court declined to apply *Borak* to a portion of § 14(a) that had not been involved in *Borak*. So that case has been limited to a single sentence of one subsection. Why, then, may the method of *Sullivan* be applied to other sections of the Civil Rights Act of 1866 despite intervening precedent?

There has been a sea change in interpretive method between *Sullivan* and today -- and *Patterson* not only exemplifies the change but also applies it to § 1981. In 1989 the Justices were invited to rely on *Sullivan* as a model for the interpretation of § 1981. They declined. Less than a year ago, in *Domino's Pizza*, the Court reiterated Patterson's interpretive stance. *Sullivan*, by contrast, did not receive a mention. Yet my colleagues do not mention *Domino's Pizza*. Why bypass the Supreme Court's 2005 understanding of § 1981 in favor of a 1969 understanding of § 1982? We must respect our superiors' decision to call a halt to judicial extrapolation; *Domino's Pizza* rather than *Sullivan* exemplifies the appropriate judicial role. By relying on *Sullivan*, my colleagues indulge an assumption -- that if some remedies are good, then more must be better -- that has no support on today's Supreme Court.

Now if § 1981 had been enacted while the freewheeling approach of *Sullivan* was in force, it might well be appropriate to adopt a goal-driven reading. To use the interpretive tools of the last 30 years to unravel a statute passed in earlier days would be to cross up the legislature. That was a point the Court made in *Jackson*: Title IX was enacted in 1972, and Congress may well have anticipated that *Sullivan*-like construction would follow. 544 U.S. at 176. The legislators who voted for § 1981 in 1866 would not have anticipated any such judicial liberties, however; and when § 1981 was amended in 1991, decisions such as *Cort* and *Rodriguez* and *Patterson* had announced a textual approach. So when a question arises in 2006 about the meaning of this 1866/1991 legislation, our job is to apply the interpretive norms that prevailed in 1866, 1991, and today, not to take an ambiguous decision from 1969 and see how far we can run with it.

Section 1981 does offer one opening for a claim in the nature of retaliatory discharge. Suppose Cracker Barrel regularly fired black employees who protest discrimination in the workplace, but not protesting white employees. Then it might be appropriate to conclude that black persons do not enjoy the same right as white persons to contract with Cracker Barrel. But Humphries does not make such an argument. For all this record shows, Cracker Barrel fires every complainer, without regard to the subject of the complaint. An employer that treats everyone the same in this respect complies with § 1981, so the judgment should be affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 03-C-3765

[Filed October 6, 2005]

HEDRICK G. HUMPHRIES,	)
Plaintiff,	)
	)
vs.	)
	)
CBOCS WEST, INC.,	)
Defendant.	)
	)

MEMORANDUM OPINION

CHARLES P. KOCORAS, Chief District Judge:

This matter comes before the court on the motion of Defendant CBOCS West, Inc. ("Cracker Barrel"), for summary judgment and the motion of Plaintiff Hedrick Humphries to strike the declaration of Kimberly Tramel. For the reasons set forth below, the motion for summary judgment is granted and the motion to strike is denied as moot.

BACKGROUND

Humphries is a former employee of Cracker Barrel at its restaurant and retail store in Bradley, Illinois. He is African-American. During the three years that Humphries worked for Cracker Barrel, he was never demoted, nor was his pay ever reduced. He was promoted at least once. Over the last eight months of his employment, Humphries received nine written or verbal warnings with respect to his work performance that were memorialized in written Employee Counseling Reports, or "ECRs." Twice these ECRs informed Humphries that potential disciplinary action included termination. The three penultimate ECRs, issued in early September 2001, stated that they were a "final" warning.

In late November 2001, Humphries informed William Christensen, the district manager for the Bradley restaurant and store, that he felt he and another African-American employee named Venis Green were being treated in a discriminatory manner because of their race.

On the morning of December 3, Joe Stinnett, another associate manager, reported finding the store safe unlocked and slightly open. Cracker Barrel policy requires that an associate manager who closes a store in the evening is responsible for making sure that the store safe is closed and locked before leaving for the night. Humphries was the associate manager on duty the night of December 2. His employment was terminated on December 5. According to Cracker Barrel, this termination occurred because Humphries was on duty the night before the safe was found open; according to Humphries, the termination was the result of Cracker Barrel's desire to retaliate against him for his November comments to Christensen.

Our prior opinions detailed the procedural morass that ensued after Humphries' termination. It is sufficient to note that, as the case now stands, the only cause of action asserted is founded in 42 U.S.C. § 1981. According to Humphries, Cracker Barrel interfered with his rights to make and enforce contracts to the same extent enjoyed by white citizens. Cracker Barrel moves for summary judgment in its favor on his claims.

LEGAL STANDARD

Summary judgment is appropriate when the record, viewed in the light most favorable to the nonmoving party, reveals that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The burden then shifts to the nonmoving party to show through specific evidence that a triable issue of fact remains on issues on which the nonmovant bears the burden of proof at trial. *Id.* The nonmovant may not rest upon mere allegations in the pleadings or upon conclusory statements in affidavits; it must go beyond the pleadings and support its contentions with proper documentary evidence. *Id.* The court considers the record as a whole and draws all reasonable inferences in the light most favorable to the party opposing the motion. *Bay v. Cassens Transport Co.*, 212 F.3d 969, 972 (7th Cir. 2000). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Insolia v. Philip Morris, Inc.*, 216 F.3d 596, 599 (7th Cir. 2000); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505, 2510 (1986).

DISCUSSION

Though Humphries originally sued under both Title VII and 42 U.S.C. § 1981, we dismissed the Title VII claims on November 1, 2004. Thus, the motion and this opinion focus solely on Humphries' § 1981 claim.[1]

To avoid summary judgment of a § 1981 claim arising from an employment relationship, an employee must show that he or she undertook the statutorily protected action of making or enforcing a contract, an action by the employer that worked to the detriment of the employee, and a causal connection flowing from the former to the latter. *See Herron v. DaimlerChrysler Corp.*, 388 F.3d 293, 301 (7th Cir. 2004). The third element can be established either directly or indirectly. *See Davis v. Con-Way Transportation Central Express, Inc.*, 368 F.3d 776, 783 (7th Cir. 2004). The direct method allows a trier of fact to find discriminatory conduct without inference or presumption. *See id.* The evidence necessary to allow a plaintiff to employ the direct method can consist of either an employer's admission that the challenged action was the product of unlawful discrimination or a

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[1] The parties do not address the issue of whether § 1981 applies to termination of an at-will employment relationship. *In Gonzalez v. Ingersoll Mill. Mach. Co.*, the Seventh Circuit opined in dicta that it does not. 133 F.3d 1025, 1035 (7th Cir. 1998). Although the court has not since passed on the question definitively, the text of § 1981, which specifically refers to termination as being within its scope, and at least one subsequent opinion make the continued vitality of Gonzalez on this point questionable. *See Walker v. Abbott Laboratories*, 340 F.3d 471, 477-78 (7th Cir. 2003). However, since Cracker Barrel has not pressed this point, we will proceed using the assumption that § 1981 can apply to the situation in this case.

combination of events that directly indicates that discrimination was afoot. *See id.* Humphries contends that he can proceed under this method under the second route. He asserts that the combination of the short period of time that elapsed between the time that he complained about Cracker Barrel's treatment of Green and him and Cracker Barrel's inaction with respect to his complaints thereafter directly establish a discriminatory motive. Despite Humphries' arguments, this is far from the "convincing mosaic" necessary to point directly to unlawful motivations behind Cracker Barrel's action. *Troupe v. May Dep't. Stores*, 20 F.3d 734, 737 (7th Cir. 1994). At best, this evidence describes a few actions concentrated at the time of termination, not the abrupt about-face or pervasive pattern held sufficient in other cases. *See Lang v. Ill. Dep't of Child and Family Servs.*, 361 F.3d 416, 419-21 (7th Cir. 2003); *Sitar v. Indiana Dep't of Transportation*, 344 F.3d 720, 728-29 (7th Cir. 2003).

The second manner by which discrimination can be shown, the indirect method, consists of a three-step process. *See Gonzalez v. Ingersoll Mill. Mach. Co.*, 133 F.3d 1025, 1032 (7th Cir. 1998). First, the plaintiff must demonstrate a prima facie case for discrimination. *Id.* To make out his prima facie case, Humphries must show that he is a member of a racial minority, that he was meeting Cracker Barrel's legitimate expectations with respect to his job duties, that he suffered an adverse action, and that similarly situated white employees were treated more favorably than he. *See id.* at 1032, 1035. If Humphries can demonstrate each of these elements, a presumption of unlawful discrimination arises, which Cracker Barrel must counter with a lawful reason for Humphries' termination. *Id.* at 1032. If Cracker Barrel does so, Humphries must then show that the proffered reason is actually a pretext for discrimination. *Id.*

Cracker Barrel challenges Humphries' showing on the second and fourth elements of his prima facie case. With respect to the second, whether Humphries was performing satisfactorily, the parties' arguments clearly indicate that material issues of fact exist. The fourth, however, clearly falls in Cracker Barrel's favor.

Humphries contends that Ken Dowd and Joseph Stinnett, who are both white and who held supervisory positions, provide the necessary points of comparison. According to Humphries, both of these employees were cited for not meeting Cracker Barrel's standards with respect to safeguarding money and other assets of the company. To be similarly situated, two employees must have the same supervisor, engage in the same conduct, have the same qualifications, and have no legitimately differentiating characteristics that would account for an employer's differing treatment. *See Ineichen v. Ameritech*, 410 F.3d 956, 960-61 (7th Cir. 2005). Humphries contends that Dowd and Stinnett engaged in conduct similar to that for which he was terminated, but they kept their jobs. However, he provides no other information about them that would be germane to the inquiry. In other words, he provides evidence that Dowd and Stinnett are comparable to him in one material respect, but by no means in all material respects. *See Sartor v. Spherion Corp.*, 388 F.3d 275, 279 (7th Cir. 2004). The latter is required to stave off summary judgment. Because Humphries has not offered any employees whom we can determine to be truly similar to him, we have no way to gauge whether Cracker Barrel behaved in a racially discriminatory manner. Because Humphries has not shown each element of his prima facie case, he cannot prevail through the indirect method.

Even if Humphries had offered a similarly situated employee, Cracker Barrel would still be entitled to summary

judgment. Viewing the situation from Cracker Barrel's perspective at the time Humphries was fired, there is nothing suspicious about their belief that a violation of their employment policy occurred when the safe was not closed and locked when the store opened on December 3, 2001. *See Stewart v. Henderson*, 207 F.3d 374, 378 (7th Cir. 2000). Because Humphries was the manager on duty the night before, it was his responsibility to make sure that the safe was closed and locked. There is nothing unlawful about an employer terminating an employee who fails to safeguard money and other valuables belonging to the employer.

Humphries counters that this reason is a lie; he supports his belief by stating that the safe was locked and closed when he left on the night of December 2. Even if we assume this is true, it does nothing more than show that Cracker Barrel's belief that Humphries had neglected to perform an important duty was incorrect, not that they did not truly hold the belief. That may show that Cracker Barrel made a mistake, but it is not pretext that would allow Humphries to overcome the legitimate business reason Cracker Barrel has proffered for terminating his employment. *See id.* Consequently, Cracker Barrel is entitled to summary judgment on Humphries' retaliation claim.

B. Racial Discrimination

Although Humphries' complaint contends that his termination was motivated both by racial animus and by retaliation for his prior complaints, it is apparent from the presentation he makes in his opposition papers that only the retaliation claim has any vitality. This is especially true given that his response to Cracker Barrel's claimed entitlement to summary judgment on the discrimination claim consists of a single paragraph that in essence contends that his arguments

with respect to the retaliation claim apply directly to his discrimination claim and defeat Cracker Barrel's motion.

This presentation does not carry the day for two reasons. First, undeveloped arguments result in waiver of the positions that otherwise might be permissible. *See, e.g., Estate of Moreland v. Dieter*, 395 F.3d 747, 759 (7th Cir. 2005). Second, as described above, Humphries' retaliation claim fails as a matter of law. If the same arguments are to apply to his discrimination claim, then it must meet a like fate.

C. Motion to Strike Declaration of Kimberly Tramel

In connection with his response to the motion for summary judgment, Humphries moved to strike the declaration of Kimberly Tramel, who identifies herself only as an employee of Cracker Barrel. Because the assertions contained within the declaration played no part in our decision and in light of the outcome of the motion for summary judgment, the motion to strike is denied as moot.

CONCLUSION

Based on the foregoing, Cracker Barrel's motion for summary judgment is granted. Humphries' motion to strike the declaration of Kimberly Tramel is denied as moot.

Charles P. Kocoras
Chief Judge
United States District Court
Dated: October 6, 2005